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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of the Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. Hor.

VOL. X.

Containing the Cases of Trinity, Michaelmas, and Hilary Terms, in the 48th and 49th Years of Geo. III.
1808—1809.

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JUDGES

OF THE

COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

EDWARD LORD ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

A

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CASES

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

In the Forty-eighth Year of the Reign of GEORGE III.

GREAT inconvenience having been felt on several occasions for want of a sufficient promulgation of the following rule, it is inserted here to aid the Practitioners at the Sittings.

REGULA GENERALIS.

Hilary Term, 44 *Geo.* 3. 1804.

IT IS ORDERED by the Right Hon. Lord *Ellenborough* C. J. &c. that in future no cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury be served, and the cause marked in the Marshal's book as a special jury, on or before the day preceding the adjournment day in *Middlesex* and *London* respectively.

GOLDING *against* DIAS, in Error.

Saturday, June 18th.

[2]

IN replevin *C. B.* the defendant made cognizance for rent in arrear, and had a verdict and judgment pursuant to the

An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3. *H.* 7. *c.* 10. which is confined to judgments recovered by *plaintiffs* below and affirmed on a writ of error. Neither is such defendant in error entitled to his costs on the stat. 8 & 9 *W.* 3. *c.* 11 *s.* 2. which is confined to judgments for defendant *on demurrer*.

1808.

GOLDING against DIAS.

stat. 17 *Car.* 2. *c.* 7., which judgment was affirmed on a writ of error brought by the plaintiff in this court.

Lawes shewed cause in the last term against a rule praying that the defendant in error might be allowed interest on the sum recovered by the judgment below, by force of the stat. 3 *H.* 7. *c.* 10; which, reciting that writs of error were often brought for delay, enacts that if any *defendant* or *tenant*, against whom judgment is given, *sue* any writ of error to reverse it, in delay of execution; if judgment be affirmed, &c. the person against whom the writ of error is sued shall recover his *costs* and *damages* for the delay and vexation. This statute, he contended, as well as the statutes 3 *Jac.* 1. *c.* 8. and 16 & 17 *Car.* 2. *c.* 8. giving costs in error, had always been confined to cases where judgments had been recovered by the original plaintiffs *(a)* below which were afterwards affirmed in error, and not to judgments recovered by defendants below: for which *Cone* v. *Bowles (b)* is in point; which was not shaken by *Bodley* v. *Bellamy (c)*. And in *Bristow* v. *Waddington (d)*, interest on the affirmance of a judgment in the Exchequer-chamber was denied, where the plaintiff below had recovered unliquidated damages.

[3]

J. W. Warren, in support of the rule, contended that the judgment below, being to recover damages for rent in arrear, was in effect a judgment for liquidated damages, and came within the words and meaning of the statute of *H.* 7. And that this was distinguishable from *Cone* v. *Bowles*, where the judgment was *pro retorno habendo*, and not for damages. And in *Shepherd* v. *Mackreth*, in the Exchequer-chamber *(e)*, the stat. 3 *H.* 7. *c.* 10. and all the subsequent statutes giving costs in error, were considered as made in pari materiâ; the latter being merely in extension of the former, and making it discretionary in the court of error to give interest or not on the affirmance of the judgment below in personal actions.

The Court, however, were of opinion that the statute of *Hen.* 7th applied only to cases where the judgment below was for the *plaintiff*, and that none of the subsequent statutes had extended the description of persons to whom relief was meant to be given by that statute. And that the case of *Cone* v. *Bowles*, which was decided after the statutes of *Jac.* 1. and *Car.* 2. had

(a) Vide *Baring* v. *Christie*, 5 *East*, 545. on the stat. 13 *Car.* 2. st. 2. *c.* 2, *s.* 10.

(b) 4 *Mod.* 7, 8.

(c) 1 *Blac Rep.* 268.

(d) 2 *New Rep.* 360.

(e) 2 *H. Blac.* 284.

settled

settled the question, that an avowant in replevin for whom judgment below was given, which was afterwards affirmed in error, was not within the statute; and therefore they discharged that rule. *(a)**

1808.

GOLDING *against* DIAS.

The defendant in error then applied to the Master to have his costs in error taxed under the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 2. which gives costs in error to the *defendant*, where the judgment below is for him and is affirmed on error. But the Master thought that this statute applied only to cases where the judgment below was upon *demurrer*, and not where it was after verdict, and refused to tax the costs. Thereupon [*4]

J. W. Warren now moved for a rule to shew cause why the Master should not tax the defendant's costs in error, on the ground that the object of the 2d section of the act of *William* was twofold; the first was to give costs to defendants *below;* where it could only look to cases of judgment *on demurrer;* because in all other cases of judgment for a defendant, he was already entitled to costs by previous statutes. The second object was to give costs to defendants in error generally; because in no case was a defendant in error before entitled to costs on affirmance of his judgment below, whether after verdict, nonsuit, or demurrer. The Court therefore will not restrain the beneficial operation of the act to affirmance of judgment on demurrer, unless that necessarily appears to have been the intention of the Legislature. The word of reference in the second part of the clause, "any *such* action," &c. will be satisfied by construing it to mean "any action brought in any court of record," without extending it to the subsequent description, "wherein on any *demurrer*," &c. And he referred to 2 *Tidd.* 1134. 3d edit. and 2 *Cellon*, 565. to shew that this construction had prevailed in practice. But

The Court said that, taking the whole context of the clause [5] together, it was evident that it only related to judgments given *on demurrer* for defendants below, to whom remedy was intended to be given for their costs, both below and above, on affirmance of such judgment, which they had not before: and therefore

Refused the Rule.

(a) Vide *Baring* v. *Christie*, 5 *East*, 545.

1808.

Monday, June 20th.

NEWMAN against MORGAN.

At common law grass is titheable in grass cocks after having been *tedded* in the course of the process of making it into hay.

THIS was an action on the case, brought by the plaintiff, as occupier of certain lands in the parish of *Hornchurch* in *Essex*, against the defendant, as farmer of the tithes of the same parish. The first count stated that after the occupiers of lands in the parish had gathered the tithes of grass growing thereon into heaps, the rector, after notice, had been used to make the same into hay. That the plaintiff had moved rye grass and clover at the time mentioned in the declaration, and gathered the tithes into heaps, and gave notice thereof to the defendant, who neglected to make the same into hay, but permitted it to rot on the ground, whereby the plaintiff was damaged, &c. A second count charged that the defendant neglected to take away the tithes of hay from the plaintiff's ground after the same had been duly set out, and notice given to him by the defendant, &c. At the trial before *Heath* J. at *Chelmsford*, the plaintiff's counsel, in opening the case, stated that the tithes had been set out from the swarth in grass cocks: when the learned Judge said that, if such were the fact, he should nonsuit the plaintiff; for the plaintiff ought first to have tedded *(a)* or made it into hay: and a witness, who was afterwards called for the plaintiff, proving that the tithes were set out from the swarths into grass cocks, without any tedding or making of the same, the plaintiff was nonsuited.

[6]

This nonsuit was moved to be set aside in the last term, upon the ground that the common law did not require any degree of labour to be applied to the grass, in the process of making it into hay, before it was tithed, but only the severance of the tenth part from the nine in grass cocks, in order that the parson might remove it or make it into hay at his own expence. And a rule nisi was granted; against which

Shepherd and *Best*, Serjeants, now shewed cause, and denied that the common law rule of tithing hay was satisfied by the mere division of the grass, as cut, into ten parts: for though it is not required to make it into hay, yet before it is put into grass cocks it ought to be properly manufactured for that first state

(a) To *ted*, from the Saxon *teudan*, to prepare, to lay grass newly mown in rows. Haymakers following the mowers, and casting it abroad, they call *tedding*, *Johnson's* Dict. cites *Mortimer*.

in

in the process of hay-making, in the same manner as the farmer himself would deal with his own nine parts. The tedding or scattering it abroad after it is cut in the swarth is for the purpose of drying it in a certain degree before it is put into grass cocks, and without which process it must be deteriorated. It would even be injurious to the farmer to take the raw and wet grass into cocks without such previous drying, which would cause it to heat and ferment, and would induce the necessity of immediately [7] reducing it again to its first stage, in order to preserve it for making it into hay. The universal method of treatment in this respect shews what the common law requires. Without this previous scattering abroad and drying, the cocks would not be made equal, as there is often a considerable difference in the swarth in different parts of the field. [*The Court* intimating their concurrence with the argument of the plaintiff's counsel, the latter refrained from discussing the authorities with which they were furnished, and which were only alluded to generally.]

Garrow and *Marryat*, in support of the rule, admitted that the tithe could not be taken of the grass in the swarth, because of its inequality; but contended that it was lawful at common law for the farmer to set out the tithe in the first stage when the grass is capable of being put into equal heaps, before any labour was applied towards making it into hay. And though the swarth may be unequal in different parts, yet there is no difficulty in collecting it into equal heaps by raking more together in those heaps where the swarth is thinnest: and no injury can arise to the tithe owner, as he may begin counting the heaps where he pleases. The course pursued by the defendant did not preclude the plaintiff from sending his own labourers into the field to make his tenth part into hay; but it is admitted that the farmer is not bound to labour for the tithe owner for that purpose: and if not for the whole process, why for any part of it, as tedding it? There was no fraud in this case; no intention of spoiling the tithe of the grass; nor is it capable of being injured by severing the swarth immediately into heaps, if the tithe owner be ready [8] with his own labourers, as he ought and is required to be, either to remove or to make it into hay on the land *(a)*: the farmer must do the same by his nine parts. A custom for the farmer to

(a) In *Crabb* v. *Hayne*, *H.* 16 *G.* 2. 1742, the Court held that where the tenant had set out his tithe of hay in grass cocks only, the parson had a right to make it into hay on the tenant's land. *Webb* v. *Gordon*, in 1711, S. P. 2 *Wood.* 5.

ted

1808.

NEWMAN against MORGAN.

ted the grass of the first mowing for the rector may be a legal foundation for an exemption from tithe of the second mowing: as in *Hall* v. *Fettyplace (a)*; where the custom was laid to be for the farmers to cut down the grass, "and the said grass to *ted* and shake abroad, and the said grass so dispersed and cast abroad, to gather into weoks and windrows, and to put into small cocks; *et post primam circumlationem inde*, the tenth cock *inde* to set forth for the parson, in satisfaction of all tithes, as well of the first as of the latter mowth of that meadow, for the same years." And on demurrer it was moved that the prescription was not good, because no more was given to the parson than he ought to have. But because it was alleged, "that the farmer at his own costs had tedded and shaken it abroad, and gathered it into weoks and windrows, and made it into little cocks," *and so was at a greater labour and charge than the law appoints*, and the parson hath benefit by the said labour, it was adjudged a good cause of discharge. Now the custom there alleged is exactly what is here claimed by the rector to be done as of common right. [Lord *Ellenborough* C. J. That must depend on what was understood by "*post primam circumlationem inde (b)*." The case there cited, of *Johnson* v. *Awbrey (c)*, as *all one* with the case at bar, was a custom for the farmer to make the first mowth into *hay*, and set out the tenth cock of *hay*, in satisfaction of the tithe of the latter mowth.] The same point was adjudged 14 years afterwards in *Hide* v. *Ellis (d)*, where it more distinctly appears that the custom set up was to do no more than what is now claimed as of common right; viz. "to cut the grass, and strew it abroad, called *tedding*, and then to gather it into winreves, and then to put it into grass cocks in equal parts, without fraud, and then to set out every 10th cock great or small to the parson." [*Le Blanc* J. That case is cited by Lord *Rolle* in 1 *Rol. Abr.* 644.: but he refers to several other cases as having decided the contrary.] If any thing be required to be done be-

[9]

(a) *Cro Jac.* 42. and vide *Green* v. *Austin*, *ib.* 116.

(b) Something was meant more than *tedding*; which is admitted to be the first scattering abroad out of the swarth, and before the grass so tedded is put into grass cocks. That operation is previously described in the custom as here stated. Therefore what follows, viz. "et *post* primam circumlationem *inde*," must mean after the first scattering abroad *from the small cocks so before tedded*; and then the *tenth cock inde*, (that is, when made again into cocks from such last mentioned scattering abroad out of the small cocks so before tedded) was to be set out for the rector.

(c) *Cro Eliz.* 660. (d) *Hob.* 250.

yond

yond the severing of the grass into the ten parts by raking it into grass cocks from the swarth, it may as well be made into hay; which is not contended for *(a)*. But where, in *Fox* v. *Ayde (b)*, it was objected that the parishioners *de jure* ought to make the tithe grass into hay; Lord *King* C. declared the law to be otherwise, and that all that the parishioners were bound to do was "to cut down the grass, and divide it into ten parts; after which the parson was to make it into hay." And it is a sufficient check against fraud that the farmer must put his own nine parts of the grass into cocks from the swarth, as well as the rector's 10th part. It may not always be necessary to ted the grass at all before putting it into grass cocks.

1808.

NEWMAN *against* MORGAN.

[10]

Lord ELLENBOROUGH C. J. If, from the state of the weather and the condition of the grass, tedding were not necessary before it was put into grass cocks, the plaintiff should have shewn that; but as no evidence of that kind was offered, we must take the fact to be that the usual method of treating the grass after it was cut, by tedding it before it was put into grass cocks, in the common process of making it into hay, was proper to have been pursued in the present instance, and that it was not done. It appears to me that the learned judge correctly laid down at the trial the common law principle of tithing as applied to this case. It cannot be, that all that is necessary to be done by the occupier is to cut down the grass and divide it into ten parts, as Lord Chancellor *King* is supposed to have said in the case cited. Nobody contends that it is sufficient to give the rector the tenth blade of grass, or that it is to be tithed in the swarth, which is often so unequal that it cannot be fairly divided. The rule then is for the rector to take his tenth part in that first convenient stage of the process when the subject-matter may be equally divided, and that is when it is put into grass cocks in the common process of hay making: and it is agreed on all hands that the usual course is for the grass to be tedded after it is cut before it is made into grass cocks. This may possibly not be necessary under extraordinary circumstances of weather; but where that is so, it ought to be shewn. It is said, however, that tedding was held not to be necessary in *Hall* v. *Fettyplace*, and *Hide* v. *Ellis*. That does not so distinctly appear by the former of those cases: but at

[11]

(a) It was once said, 1 *Rol. Rep.* 173, that the parishioner ought to make the grass into *hay;* but vide *Smithson* v. *Dodson*, 9 *Mod.* 117. 2 *Blac. Com.* 29, and *Bendict* v. *Kemble*, 2 *Wood's Exch. Tithe Causes*, 345.

(b) 2 *P. Wms.* 322.

any

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NEWMAN *against* MORGAN.

any rate the authority of them is questioned by Lord *Rolle* in his *Abridgment*, who refers to other cases where the contrary was adjudged. In addition to which the doctrine of *Hide* v. *Ellis* has been expressly contradicted in a modern case, that of *Brook* v. *Power (a)*; where in answer to a bill filed by the rector of *Fryern Barnet* for an account of tithes in kind, amongst others for the tithe of hay, the defendant *Power* stated that in 1773 he mowed a field of grass, and put the produce into grass cocks, and gave the plaintiff notice that he was ready to set out the tithes thereof: that the plaintiff thereupon attended, and desired to know whether such grass had been tedded abroad and raked in before it was cocked; and on being informed that it had not, but that the same was cocked out of the swarth, he refused to take it in that way. That the defendant being informed by some of the oldest inhabitants of the parish that such had been the custom, refused to set out the tithes in any other manner. But the Court, after hearing witnesses, ultimately decreed the defendant to account for the tithes. The Court therefore pronounced on the mode of setting out the tithe of hay there claimed by the rector, as the common law obligation; that the subject-matter first presents itself in a titheable shape when put into grass cock, and that *tedding* is necessary before it is put into such cocks.

[12] GROSE J. declared himself of the same opinion.

LE BLANC J. The rule laid down by the learned judge at the trial is the common law rule; and where there are any exceptions to it, those must be shewn. The same rule was also recognized in a case of *Blaney* v. *Whitaker*, which was tried on the Western Circuit, and came before this Court on a motion for a new trial in *M.* 23 *Geo.* 3. "It was an action on the case against the parson for not taking away the tithe of turnips after they had been set out. The turnips had been drawn to feed cattle, and every tenth turnip was thrown aside as drawn on a ridge opposite to the parson. The question was, Whether the tithe were properly set out? the parson contending that the turnips ought to be set out in heaps, or at least gathered into heaps for him. Mr. Justice *Ashurst* said that in hay and corn, the farmer must put it into *cocks* and sheaves, for his own benefit, and therefore he should do the same for the parson; but that a man was not obliged to bestow more labour than the nature of the thing required for the benefit of the

(a) 4 *Wood's Exch. Tithes, Cases*, 91.

parson:

parson: and that this agreed with the cases. Mr. Justice *Buller* said that he entirely agreed with his Brother *Ashhurst*. That if the farmer put them into heaps for himself, he should do so for the parson; but if he did not do so for himself, he need not do so for the parson. That the rule of law was, that things should be tithed as soon as they were in a proper state to be tithed: the same was the case with hay and corn. The rule for a new trial was discharged." When then is this subject-matter in a proper state to be tithed? when it comes into grass cocks in the ordinary course of the process of making it into hay; that is by first turning over the swarth after it has been cut, that the under side may be exposed to the action of the sun and air; which I take to be tedding it; and in that case only (I do not speak of extraordinary cases) can it properly be put into grass cocks. The case cited by my lord out of *Wood*'s collection lays down the same rule; and that has settled the question, and removed the doubt which might have existed upon the earlier cases referred to in argument; which, however, Lord *Rolle* stated to have been contradicted by other decisions which he mentions.

BAYLEY J. assented.

Rule discharged.

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[*14]

WHITEACRE, on the Demise of BOULT, *against* SYMONDS.

Monday, June 20th.

THE day of the demise in this ejectment was laid on the 12th of *October* 1806, and at the trial before *Grose* J. in *Suffolk*, it appeared that the defendant had for many years held the premises in question, consisting of a cottage, barn, and about five acres of land, as tenant from year to year, of the lessor of the plaintiff; who being desirous of selling the property, on the 22d of *March* 1806 served the defendant with a written notice to quit the premises on the 11th of *October* next (being* *Old Michaelmas-day,)* from which time the taking had originally commenced. The defendant continued notwithstanding in possession, and this

A landlord of premises about to sell them gave his tenant notice to quit on the 11th of *October* 1806, but promised him not to turn him out, unless they were sold: and not being sold till *February* 1807, the tenant refused on demand to deliver up possession. And on ejectment brought; held that the promise (which was performed) was no waver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice if necessary; and therefore that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit.

eject-

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ejectment was brought in *Easter* term 1807. Two letters were given in evidence; one from the defendant to the landlord's agent, dated 1st of *June* 1807, wherein the defendant stated, "my landlord has given me an order to quit the house this month, and has served me with a writ of ejectment. I have lived there many years, and am loth to leave the premises. I did not expect any such treatment from him; you having always promised me *that I should not be turned out unless the house was sold.* I should be glad to continue until the premises are sold. He has threatened to seize all my property. I should be glad to stay where I am if you approve of it." The other letter was from the landlord's agent, in answer to the above, dated the 11th of *June.* "Mr. *Symonds*, I have just received your letter respecting the quitting of the house at *Tritton.* You say *I promised you should not be turned out, until the place was sold: I did so, and have been as good as my word:* for Mr. *Boult* (the lessor) sold the place last *February* to a person at *Summerly*, for him to have possession at *Lady-day* last, which I find you have withheld: and you must know that you are wrong in so doing. Had the purchaser not objected to your staying, I should not: but as it now stands I expect you to quit when required," &c. There was also proved an agreement, dated in *February* 1807, for the sale of this estate from Mr. *Boult* to the purchaser; to whom possession was to have been delivered in *March* following. The objection was taken at the trial, that the subsequent permission of the landlord by his agent, for the tenant to continue in possession until a sale, was a waver of the antecedent notice to quit, so far as to prevent the tenant from being considered as a trespasser by relation back to the 11th of *October* 1806, when the notice to quit expired; although he continued in possession afterwards at the will of the landlord, which might be determined at any time, but which was not in fact determined till *Lady-day* 1807, or at least not sooner than the *February* before, when the contract for sale was made. *Grose* J. however thought that the meaning of the agreement was that the permission to remain in possession was only conditional until a sale; the landlord reserving to himself the power to act upon his notice to quit, if necessary, in case of a sale: and that a sale having been made, and the tenant having refused to quit the possession when demanded of him, the landlord had a right to act upon his original notice to quit: and therefore the plaintiff obtained a verdict; but leave was given to move the Court to set it aside and enter a nonsuit, if the direction were wrong.

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wrong. Accordingly a rule nisi was obtained in the last term for this purpose; against which

Wilson and *Storks* were to have shewn cause: but *Dampier* was called upon to support the rule; who contended that the tenant, having had an express licence from his landlord to continue on the premises *until* a sale, could not be treated as a trespasser during the intervening period, which he must be deemed to be if the notice to quit were good; and therefore by necessary implication it must be taken to have been waved. For as a recovery in this ejectment would be conclusive evidence that the defendant was a trespasser on the 13th of *October* 1806, it is repugnant to the evidence, which goes to prove that he was then in by licence. The demise should have been laid after *Lady-day* 1807, [16] or after the sale. The landlord could not have brought ejectment before a sale, and by the same rule he cannot lay his title to have accrued before the sale. If he had brought trespass, the tenant might have pleaded the licence up to the time of the sale. The tenant has been entrapped to expend his money and labour on the premises under the licence to occupy, and is now to be made a trespasser by relation during the same period: but the law will not construe the agreement so as to produce so unjust a consequence: but will consider it as creating a tenancy at will, which it was necessary to determine by notice, before the tenant could be proceeded against as a trespasser; as in *Goodtitle* v. *Herbert* (*a*).

Lord ELLENBOROUGH C. J. I cannot construe the language of this correspondence on the part of the landlord, as constituting a new tenancy between him and the defendant after the time of the notice to quit, or as a waver of that notice: nor was it a licence for the purpose now insisted upon. The landlord was willing indeed to let the defendant remain on the premises till a sale, but he was anxious at the same time to retain, and did reserve to himself, all his rights under the notice to quit, with which he was armed, in order to enforce obedience to that notice if it should be necessary. He said, in answer to the tenant's application, that he would not turn him out until the place was sold; that is in effect saying, that until the place were sold, he would suspend the exercise of his right under the notice to quit: but it could not have been intended to give the tenant such a licence as would vacate the notice, and be destructive of the right which [17] the landlord was so anxious to retain. No man would grant an

(*a*) 4 *Term. Rep.* 630.

indulgence

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indulgence of this sort to his tenant if this use were to be made of it, plainly contrary to the understanding of the person who granted it. Here the landlord has kept his promise, and did not turn out the tenant before he had sold the premises: but the tenant has broken his engagement by not delivering up the possession after the sale, and now ungratefully holds out against his landlord. It was for the tenant to choose whether he would continue to hold on and to expend his money and labour on the premises under such an insecure sort of agreement, but having chosen to run the risk, he must take the consequence.

GROSE J. I considered this as an unfair attempt on the part of the tenant to take advantage of and convert that into a right which the landlord meant only as an indulgence to him; to permit him to stay on the premises until they were sold; but still to retain the right of compelling him to quit under the notice if a purchaser offered. The notice was given and persisted in for the express purpose of enabling the landlord to sell the premises to more advantage, and that, if sold, he might not be disabled from giving possession at the time to the purchaser.

LE BLANC J. If this were to be considered as a licence to the tenant to continue in possession, to be sure he could not be treated as a trespasser until the licence was determined; but upon the construction of the letter, coupled with the situation in which the parties stood at the time, I think it is clear that the landlord neither intended to grant him a licence, nor to consider him at all as a tenant. Suppose the promise, not to turn the tenant out before the place was sold, had been made before the notice to quit; but the landlord had then informed him that he would not preclude himself if he thought it proper to give him a notice to quit; what objection could have been made to the notice, if it were afterwards given? Then how does it differ the case that the promise, though made afterwards, was made subject to the notice to quit? The landlord insists all along upon his notice to quit, though he promised not to turn the tenant out before the sale.

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BAYLEY J. The fair meaning of the letter is, that the landlord would not bring ejectment to turn the tenant out of possession upon the notice to quit, unless the premises were sold; but that he did not mean to dispossess himself of the legal right to turn him out on the notice after the 11th of *October*. The only effect of the recovery in this ejectment upon any subsequent action for the mesne profits will be that the day of the demise laid in the declaration in ejectment will be conclusive of the right of the

the landlord to the possession of the premises from the 11th of *October*: but the tenant will still be entitled to shew, if he can, that the land had been of no value to him during that time; and then the landlord would only recover nominal damages.

Rule discharged.

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WHITEACRE dem. BOULT *against* SYMONDS.

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WARNEFORD *against* KENDALL.

Monday, June 20th.

The possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not a *possession* within the penalty of the game laws.

THE plaintiff declared in debt for the 5*l.* penalty given by stat. 5 *Ann. c.* 14. against the defendant for *exposing to sale* a hare, not being qualified in his own right to kill game, nor entitled thereto under any person so qualified; against the form of the statute. At the trial it was proved that the plaintiff went out coursing, and killed a hare on *Shipston* manor, when the defendant, who was employed as a carpenter and woodman by Mr. *Earl* the lord of the manor, and had directions from him to detect poachers, came up and took the hare from the dog, and carried it away, notwithstanding the plaintiff claimed it, to Mr. *Earl*'s steward according to his instructions. *Lawrence* J., before whom the cause was tried, thought that this was not a case within the statute; but upon the authority of *Molton* v. *Cheeseley*, 1 *Esp. N. P. Cas.* 123, with which he was pressed by the plaintiff's counsel, he suffered a verdict to be taken for the plaintiff, with leave to the defendant to move to set aside the verdict and enter a nonsuit, if the plaintiff were not entitled to recover. And a rule nisi having been obtained for that purpose, upon the application of *Park* and *Littledale*;

J. Williams now shewed cause, and contended that the penalty was incurred by the defendant, within the express words of the statute 9 *Ann. c.* 25. *s.* 2., which enacts that, "if any hare, &c. "shall be found in the possession, &c. of any person whatsoever, "not qualified in his own right to kill game, or being entitled "thereunto under some person so qualified, the same shall be "taken to be an exposing to sale thereof within the true intent "and meaning of the stat. 5 *Ann.*" For the defendant was not qualified in his own right, and the steward of the manor, who at most could have had but a delegated authority from his master, could not transfer such authority to another. And as to the defendant's possession of the game being bonâ fide, and without any intention to offend against the game laws, that cannot vary the

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case; as was held in *Calcraft* v. *Gibbs* (*a*); where, though the defendant had acted bonâ fide as gamekeeper under a deputation to one who claimed to be lord of the manor, yet the claimant's title failing, the defendant was deemed liable to the penalty. So the possession of naval stores, however innocently, cannot be justified except in one or other of the ways protected by the act (*a*).

Lord ELLENBOROUGH C. J. The question is, Whether the *possession* of the defendant were such as to constitute an offence and subject him to the penalty under the statute? He did not claim the hare as his property, nor acquire the possession of it for himself, but for his master, on whose manor it was taken; and if this be an offence, no case can be stated in which an unqualified person can innocently come in contact with game. It may as well be said that if a qualified man returning home with a bag of game were to fall from his horse, another could not lawfully take up the bag in order to assist the owner: or that [21] if a person seized an offender who had naval stores unlawfully in his possession, and took them away in order to bring them before a magistrate, that would be an unlawful possession against the acts of parliament made for protecting the king's stores. The case of *Molton* v. *Cheeseley* must have been imperfectly stated (*b*).

GROSE, LE BLANC, and BAYLEY, Justices, assented; and the former observed that the possession of the game by the defendant was rather for the purpose of protecting the game, than in breach of the laws for preserving it.

Rule absolute.

(*a*) 5 *Term. Rep.* 19.

(*b*) 9 & 10 *W.* 3. *c.* 41. and vide stat 39 & 40 *G.* 3. *c.* 89., which recites the intervening statutes: but see the case before *Foster* J. in the Appendix to his Treatise on the Crown Law, 439. edit. of 1792. and 2 *East's P. C.* 765.

(*c*) The fact proved there was that a pheasant had been killed *by accident* by the defendant's dog; and the defendant had afterwards carried it away. Two penalties were sought to be recovered, one for having the pheasant in his *possession* not being qualified, the other for keeping a dog to kill game. Mr. Justice *Buller* is said to have ruled that the plaintiff could go for one penalty only, "for that both offences being by the same *act*, the plaintiff could recover but one penalty under the same statute." The wording being equivocal, it was considered at first as if by the word *act* was to be understood *statute*; which it was agreed on all hands could not have been ruled by the learned judge; who probably said that two penalties could not be recovered under this statute for the same act done by the defendant.

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HARTLEY *against* RICE.

[22]

Tuesday, June 21st.

A wagering contract for 50 guineas, that the plaintiff would not marry within six years, is primâ facie in restraint of marriage, and therefore void; no circumstances appearing to shew that such restraint was prudent and proper in the particular instance.

THE plaintiff declared in assumpsit upon a wager made on the 25th of *November* 1799, whereby he betted with the defendant 50 guineas that he the plaintiff should not be married in six years; stating that in consideration that the plaintiff promised to pay the defendant 50 guineas in case he, the plaintiff, should be married within that time, the defendant promised to pay the plaintiff the like sum if the plaintiff should not be married within that time. And then the plaintiff averred, that from the time of making the promise he has not been nor is yet married, but during all the time has remained and still is unmarried; whereby the defendant, at the expiration of six years from the making of the promise, became liable to pay to him the said sum, &c. To this the defendant demurred specially, on the ground that the contract declared on was illegal and void; the same having been entered into in restraint of marriage, and tending to prevent the plaintiff from marrying during six years, &c.

Burrough, in support of the demurrer, argued that a party binding himself not to marry on pain of paying a sum of money was a contract in restraint of marriage, and therefore void by the express determination in *Lowe* v. *Peers* (*a*). That indeed was a covenant not to marry any body else besides the plaintiff; which being indefinite might extend to the duration of the defendant's life: but the length of time in which the restraint is to operate, or the amount of the penalty, cannot make any difference in principle, any more than the form of the contract in that case being by deed, and in this by parol. *Baker* v. *White* (*b*) was also the case of a bond set aside, on account of its being in general restraint of marriage, as Lord *Hardwicke* declared in *Woodhouse* v. *Shepley* (*c*).

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Marryat, contra, denied that this was a contract in restraint of marriage; *i. e.* for that purpose; though collaterally it might have that operation on the mind of the party: but such a possibility would not vitiate the contract. Supposing, however, that it was a contract in partial restraint of marriage, he endeavoured to distinguish this from the cases cited, by saying that they went upon the restraint of marriage being general,

(*a*) 4 *Burr.* 2225. *Vide* S. C. in the Exchequer, *Wilmot's Rep.* 364.
(*b*) 2 *Vern.* 215. (*c*) 2 *Atk.* 540.

and

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and such as would enure during the lives of the parties; which was unreasonable in itself; but there was nothing unreasonable in a party restricting himself from marrying for six years: circumstances might render it prudent and proper to impose such a temporary qualified restraint; the party might have been a minor: and nothing appeared here to shew the contrary.

Burrough replied, that in the absence of circumstances which shewed expressly that this was a prudent and proper restraint of marriage in the particular instance, the case fell within the general rule against all contracts in restraint of marriage.

Lord ELLENBOROUGH C. J. On the face of the contract its immediate tendency is, as far as it goes, to discourage marriage; [24] and we have no scales to weigh the degree of effect it would have on the human mind. It is said, however, that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to shew that the restraint was reasonable; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract. Wagers in general are seldom indifferent in their tendency, and this certainly is not so.

GROSE J. Every contract in restraint of marriage is illegal, as was said by Lord *Hardwicke*. But this is endeavoured to be distinguished from former cases, as not being a total and indefinite restraint of marriage: that however must depend upon the duration of the party's life. If good for six years, why not for a longer period?

LE BLANC J. This case is presented to us stripped of all particular circumstances, and therefore must be determined by the general rule of law. Now it is impossible to say that such a contract might not have an effect on the mind of the party to deter him from marrying during the six years; but a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law: and nothing is stated here to shew it to be otherwise in the particular instance.

BAYLEY J. This wager is calculated to operate against marriage, and no prudential reasons are shewn to have conduced to it in this instance; therefore it falls within the general rule, [25] that being a contract in restraint of marriage generally, it is void.

Judgment for the Defendant.

The KING *against* The Inhabitants of ST. JAMES in BURY ST. EDMUNDS.

Wednesday, June 22d.

A labourer employed by his master to drive his cart into a parish with one load and to return with another, and who broke his leg there by accident, which detained him for some time, in such parish, by which he was relieved, is to be considered as *casual poor*, and as such is not removable either under the stat. 13 & 14 *Car.* 2. *c.* 12. or the stat. 35 *Geo.* 3. *c.* 101. as not coming there to *settle or inhabit;* and consequently the expenses of his relief cannot be directed to be paid during the suspension of the order of removal under the latter statute.

TWO justices, by an order in the usual form, reciting the complaint of the churchwardens, &c. of the poor of the parish of *St. James,* &c. that *Samuel Offord* did lately *come to inhabit* in the said parish, not having gained a legal settlement there, and that he was then actually chargeable to the parish, removed the said *S. Offord* from *St. James,* in *Bury,* to *Ixworth.* both in *Suffolk;* which order was quashed, on appeal to the Sessions, subject to the opinion of this Court on a case, stating;

That the pauper *Offord* being settled in *Ixworth* was employed, on the 23d of *December,* 1807, as a day-labourer, by *R. Heffer of Ixworth,* to drive a load of hay to *St. James's* in the town of *Bury,* and to return with a load of muck. In loading the muck he fell and broke his leg. On the 24th *December* two magistrates took the pauper's examination, made out the order of removal, and (the pauper being unable to be moved) suspended the execution by an indorsement on the back of the order. The pauper was attended by a surgeon by the order of the parish officers of *St. James,* and the expence of 16*l.* 13*s.* was incurred for his cure and maintenance. On the 1st of *April* 1808, the pauper being able to move, the magistrates took off the suspension, and made the *order for payment of the 16*l.* 13*s.* for the expences, by indorsing the same on the order of removal; and on the same day the order was executed, and the pauper conveyed to *Ixworth.*

The Attorney General and *Storks,* in support of the order of Sessions, objected to the original order of removal and the order for payment of costs during the suspension of it, upon the ground that casual poor were not removeable before the stat. 35 *Geo.* 3. *c.* 101, and that act did not enable the magistrates to remove any persons who were not removeable before, but was meant to prevent persons who were removeable from being removed during illness or other infirmity which rendered it dangerous to them. The stat. 13 & 14 *Car.* 2, *c.* 11., which first gave the power of removal, is confined to persons *coming to settle* in a parish in any tenement under the yearly value of 10*l.*: and therefore where an order of removal only stated that the pauper had *endeavoured* to

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intrude into the parish, &c., it was held (*a*) ill. The stat. 35. *Geo.* 3. *c.* 101, which enables the magistrates to suspend orders of removal, uses the words *inhabiting* or *sojourning* in the place from whence the pauper is to be removed. But neither could this pauper, in any fair sense of the words, be said to have *come to settle* in the parish of *St. James* in *Bury*, nor to have been *inhabiting or sojourning* there at the time of the order of removal made. The law throws the obligation of providing for casual poor on the parish in which they happen to be when the necessity arises. This is every day's experience. And in *Simmonds* v. *Wilmott and Others* (*b*), Lord *Eldon* C. J. of *C. B.* held that where a person had relieved one who came under that description, he had a right to recover the expences from the parish officers. [Lord *Ellenborough* asked if there had been any subsequent recognition of the point said to have been ruled in that case: but no answer was given.] The general point was decided in *Newby* v. *Wiltshire* (*c*) in this court, where it was held that the master of the pauper, who broke his leg as he was driving his master's waggon, was not liable to the surgeon for his cure; but that the parish were bound in the first instance to have taken care of him. So in *Watson* v. *Turner* (*d*), a subsequent promise made a parish officer to pay the expences of a pauper's cure out of the parish was held binding as a consideration founded upon a moral obligation on the parish to provide for their poor (*e*).

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Frere, contrà, denied that there was any distinction between casual and other poor, in respect to their removal. Before the stat. 35 *G.* 3. it was always considered that coming to settle upon a tenement under 10*l.* a year, and being likely to become chargeable, were convertible terms; and the only difference that statute has made in this respect is to prevent persons who before were liable to be removed, as likely to become chargeable, from being removed till they are actually chargeable. The word *sojourning* used in that statute bespeaks only a temporary stay in a place, as contradistinguished from *inhabiting*, which implies a regular dwelling there. At the time when the order was made the pauper had not only been sojourning in the parish for a day,

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(*a*) *Rex* v. *Graffham*, 2 *Const*, 635. *pl.* 660.
(*b*) 2 *Esp. N. P. Cas.* 91.
(*c*) *Cald.* 527.
(*d*) Exch. *T.* 7. *G.* 3. *Bull. N. P.* 129. 147.
(*e*) But the law will not raise an *implied* promise in parish officers to repay money laid out for one of their paupers taken ill in another parish. *Atkins* v. *Banwell*, 2 *East* 505.

but

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but was likely to continue there for some time. The objection would have applied as well to a removal under the stat. 13 & 14 *Car.* 2. as under the stat. 35 *G.* 3.; and therefore the argument proves too much; for the former statute has been long extended to cases not within the precise words of it; and there have been numberless instances in practice of the removal of casual poor. Admitting that the parish is bound in the first instance to relieve casual poor, one of the objects of the stat. 35. *G.* 3. was to point out a course which, without endangering the safety of sick or infirm paupers, the parish which relieved them might get reimbursed. And such a construction will best further the object of that act; for the remedy will be more promptly and efficaciously administered to casual poor from the consideration that the expence will be reimbursed to the parish. To determine now for the first time, that casual poor are not liable to be removed, will be attended with great inconvenience and encourage litigation. It will be made a question in a variety of cases with what view the pauper came into the parish from whence he is sought to be removed. The animus morandi and the animus revertendi must also be discussed. The distinction of casual from other poor is only a popular one, and not to be found in any of the statutes relating to the poor. Every person relieved in a parish to which he does not belong is casual poor. The present question was raised in *Rex* v. *Kynaston* (*a*,) but the case was decided upon another ground.

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Lord ELLENBOROUGH C. J. The case has been very fully gone into, and if the Court thought that any further light could be thrown upon it, they would have been desirous of receiving it. But no doubt can be raised on the question. No person is removeable from the parish where he is but by positive statute. In order therefore to see what that power is we must trace it to the statute itself which confers it, the 13 & 14 *Car.* 2. *c.* 12.: and that, after reciting that poor people endeavour to settle themselves in those parishes where there is the best stock, &c. and when they have consumed it, then to another parish, &c. says, that it shall be lawful, on complaint of the parish officers, within 40 days after any such person *coming to settle as aforesaid in any tenement under the yearly value of* 10*l.* for any two justices of the peace of the division where any person likely to be chargeable to the parish shall come *to inhabit*, by their warrant to remove him to the place of his last legal settlement. The expression of *coming*

(*a*) 1 *East.* 118.

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to settle denotes that the party comes animo morandi or manendi: it may be for a temporary purpose, but still it must be understood that he comes to settle there. But how can it be said that the pauper went into this parish animo morendi at all? He went into the town with a cart load of hay, which he was to dispose of, and return with a load of muck: how then can it be said that he went there to settle? Then if he were not removeable within the terms of the stat. 13 & 14 *Car.* 2. can we find any enlargement of the power of removal? The stat. 35 Geo. 3. has the words *inhabiting* or *sojourning:* but it would be an extravagant construction of either of those terms to say, that it meant to include such a case as this. Then if the order be not
[30] warranted by either of these statutes, there is no authority for it, and the Sessions have done right to quash it.

GROSE J. It is impossible to say that the pauper became removeable by the stat. 35 *G.* 3., which was passed for the purpose of preventing poor persons from being removed till they were actually chargeable, who were before removeable under the stat. 13 & 14 *Car.* 2. from the parish into which they had come to settle in a tenement under the yearly value of 10*l.*, upon being likely to become chargeable. A man coming into a town with a cart, for an hour, to dispose of his load, cannot be said to have come there to *settle:* but having met with an accident there, which detained him, he comes within the description of casual poor, and as such was neither within the stat. 35 *G.* 3. nor that of the 13 & 14 *Car.* 2., and therefore the original order was improperly made.

LE BLANC J. Whether ultimately it might be better either for the poor or for parishes, to consider persons of the description of this pauper as removeable, I cannot say; I should hope that it would not make any difference in the treatment which poor persons in their necessities should experience: but we can only look to the authority which the magistrates had to remove the pauper. Their power, if any, must be derived either from the stat. 13 & 14 *Car.* 2. or the stat. 35 *G.* 3. It has been properly admitted that the latter of these did not enlarge the power of removing poor persons, but was meant to provide that persons who by law were before removeable if likely to become chargeable, should not be removed till actually so; and to make
[31] provision for suspending the order of removal when made in case of sickness and infirmity, and that the expences incurred in the care and maintenance of the persons, between the order to remove and the actual removal of them, should be defrayed by the

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the parish to which they should be found to belong. We must then look to the stat. 13. & 14. *Car.* 2. Consistently with that statute, which enables the order of removal to be made on complaint of the parish officers of persons coming to settle and inhabit in the parish, the form of the order states the complaint of the parish officers of *St. James's*, that the pauper came to *inhabit* in their parish; (and without such complaint the justices would have no jurisdiction). The question then is, Whether this pauper came to inhabit or settle in the parish? the case shews that he did not; for it states the particular object of his coming there to drive a load of hay and return with a load of muck: therefore under the statute of *Car.* 2. he could not lawfully be the object of complaint of the parish officers; and if not, the magistrates could have no power to remove him. The question, though glanced at, did not arise in *The King* v. *Kynaston.*

BAYLEY J. The stat. 35 *Geo.* 3. was clearly intended to restrain the power of removal, and not to make persons removeable who were not so before. Then the stat. 13. and 14. *Car.* 2. only gives the magistrates power to remove persons who come to settle and inhabit in a parish. Before that statute a settlement was gained by mere inhabitancy, and the statute was passed to prevent settlements being gained by inhabitancy. Now it is clear that this pauper did not come to inhabit in the parish from whence he was removed. And as down to the period of the stat. 35 *Geo.* 3. it never was considered that a [32] person, coming into a parish for such a purpose as this pauper did, came there to *inhabit*, or was removable; therefore, since the statute, which was passed to restrict the power of removal, he cannot be considered as a person removable.

Order of Sessions confirmed.

GUARD *against* HODGE.

Wednesday, June 22d.

The venue may be changed in an action for criminal conversation on the usual affidavit.

THE venue was changed from *Middlesex* to *Devon*, in an action for criminal conversation with the plaintiff's wife, upon the usual affidavit that the whole cause of action, if any, arose in *Devon*, and not elsewhere out of that county. On which

that the *whole cause of action*, if any, arise in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife; and the venue can only be brought back by the plaintiff's undertaking to give material evidence in the original county.

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a rule nisi was obtained for discharging the former rule for changing the venue, and to bring the cause back into *Middlesex*, upon an affidavit that the marriage of the plaintiff with his wife was had in *Ireland*.

Dampier, in shewing cause against the last rule, said that it was to be collected from the affidavit that *Devon* was the only place where the parties had met. That the question came to this, Whether the venue could ever be changed in this kind of action; which depended on whether the corpus delicti, or cause of action, were the criminal intercourse, or the injured sense of feeling which the husband carried about with him wherever he went? and it seemed the former. That the action in its form must be taken to be an action on the case, and not of trespass; otherwise the statute of limitations would run on it in four years, instead of six, as it had been determined to do.

[33] *The Attorney-General* and *Harris*, in support of the rule, urged as an objection to changing the venue in such an action, that the defendant could not make the usual affidavit, without in some degree admitting the cause of action: and as the marriage of the plaintiff was had in *Ireland*, he could not bring the venue back again to *Middlesex* by giving the usual undertaking to give material evidence there. The gist of the action is the per quod consortium amisit, and therefore the plaintiff is damaged in every county where he is after the loss sustained. There is no instance of changing a venue in an action for debauching the plaintiff's daughter per quod servitium amisit. And in *Cailland* v. *Champion* (*a*), where the venue had been improperly changed, the Court ordered it to be brought back again.

Lord ELLENBOROUGH C. J. The rule for changing the venue having been made on the usual affidavit, that the whole cause of action arose in the county of *Devon* and not elsewhere, makes it necessary to consider what is the whole cause of action in this case. Now that is the trespass committed on the wife; and the proof of the marriage of the plaintiff, though necessary to entitle him to recover for the injury complained of, is no part of the cause of action. As in *Clarke and Another, Assignees*, &c. v. *Reed* (*b*,) where upon a rule for changing the venue from *London* to *Essex*, in an action brought by the assignees of a bankrupt against the defendant for money had and received; it having been objected that the commission was issued at *West-*

(*a*) 7 *Term. Rep.* 205. (*b*) 1 *New Rep.* 310.

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minster, and that the assignees were chosen at *Guildhall*; and that as it thereby appeared that* the whole cause of action did not arise in *Essex*, therefore the plaintiff was entitled to retain his action in *London*: the Chief Justice said that if the cause of action arose in two different counties the defendant had no right to change the venue; but that the matters stated were no part of the *cause of action*, which must have arisen before the bankruptcy; though they were material evidence to be given in support of it. Therefore that the plaintiff must undertake to give material evidence in *London*, in order to draw back the venue. So here, though the marriage be a material inducement to the right of the plaintiff to maintain the action in respect to the trespass on his wife, yet it is no part of the cause of action; and consequently the venue can only be brought back by the plaintiff's undertaking to give material evidence in *Middlesex*.

Per Curiam, Rule discharged.

Thursday, June 23d.

The TRENT Navigation Company *against* HARLEY.

DEBT on bond given in 1799 for 500.; the condition of which, reciting that the company's committee had appointed *James Ella*, collector of their tolls, and that the defendant and one *Barnsdale* had agreed to give their bond as sureties for *Ella's* faithful discharge of his duty, was that if *Ella* should, as long as he continued collector, from time to time perform the orders of the committee, and render to them or their treasurer, &c.* true accounts in writing of all monies which he should receive and pay on account of the navigation, &c. and also if he should from time to time truly pay to the treasurer, when required, all sums of money which should come to his hands as such collector and receiver, without fraud or delay, and in all things faithfully execute the said office of collector, &c. then the bond to be void. The declaration then set out a breach of the condition, that *Ella* did not pay to the treasurer, when required, all sums of money which came to his hands as such collector, &c. to wit, 600*l.* between the 6th *August* 1799 and 1st of *November* 1807: of which the defendant afterwards had notice, &c.

The defendant pleaded, 1st, non est factum. 2dly, That *Ella*

The laches of obligees in a bond, (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees,) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel *at law* in an action against the sureties.

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Ella did from time to time *pay* to the treasurer, when required, all the sums which came to his hands as collector, &c. 3dly, That before *Ella* refused or was required to pay to the treasurer the said supposed sum come to his hands as collector, to wit, on the 6th *August* 1801, *Ella rendered accounts* in writing to the committee, which purported to be true accounts in writing of all sums by him before received and expended, as collector, &c. which accounts were allowed, approved of, and passed by the said committee; and *Ella* in due manner when required paid to the treasurer the sums which upon the balance of the same accounts appeared to be in his hands; and the committee and the plaintiffs, when they so allowed, approved of, and passed the same accounts, might, without their wilful neglect or default, have discovered any sums received by *Ella* as collector, &c. not included, and which ought to have been included therein, and any false or fraudulent entry, calculation, balance, or other error, or deceit in the same accounts, &c.: yet the committee [36] and the plaintiffs neglected so to do, and neglected to require *Ella* to pay any other sum than the balance in the accounts so delivered, &c. and *also neglected to give due notice to the defendant* of any refusal or default of *Ella* to pay any sum *for six months* after the passing and allowing the same accounts: by reason of which premises and of the laches of the plaintiffs in that behalf, and inasmuch as the defendant, without his default, was altogether ignorant of the premises, the defendant became wholly discharged from all liability to the plaintiffs on the bond, by reason of *Ella's* refusal to pay to the treasurer the said sum by him received as aforesaid. The 4th plea stated that when the accounts were so rendered to the committee by *Ella*, and allowed, approved, and passed by them, (as mentioned in the last count), he was in due manner required and did in due manner pay to the treasurer the respective balances appearing to be due on such accounts; and that the committee and the plaintiffs at the time they so allowed, approved, and passed the accounts, had notice that *Ella* had received certain sums, as collector, &c. not included, and which ought to have been included, in those accounts, being the sums mentioned in the declaration, and also then knew of false and fraudulent entries, balances, and other errors, &c. in such accounts: yet the committee and the plaintiffs for a long time, to wit, six years after the passing of those accounts, neglected to require *Ella* to pay the sums so received by him, or to pay any other sum than the balances appearing on the accounts so rendered, &c. and during all that time neglected

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to give the defendant notice of any default or refusal of *Ella* to pay or account, &c.; and fraudulently concealed from the defendant that *Ella* had concealed the same; and that he had made the said false* and fraudulent entries, balances, and errors, &c. by reason of which premises, and by the laches of the plaintiffs, and inasmuch as the defendant, without his default, was ignorant of the premises, he became wholly discharged from all liability, &c. The 5th plea stated more generally that the plaintiffs might, without their wilful neglect and default, have detected any sums received by *Ella* as collector, which ought to have been paid or accounted for by him to the plaintiffs, or any false entry, balance, error, &c. in the accounts so rendered by him: yet they neglected so to do, and *for six years*, after the respective times of receiving the said supposed sums by *Ella*, they neglected to require him to pay them, *and also* neglected to give notice to the defendant of his default, &c. and the defendant, without his default, was ignorant of the premises and of the laches of the plaintiffs in that behalf, and thereby became discharged, &c. The 6th plea stated, that after *Ella* had received the sums in the declaration mentioned and not paid over, &c. the plaintiffs had notice of the same and also of divers false entries, &c. and balances in his accounts, &c.; yet they neglected for the time and in the manner in the 5th plea mentioned, &c. Issues were taken on all these pleas.

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At the trial before *Wood* B. at *Leicester*, *Ella* the collector proved that, having received considerable sums for tonnages, he was, in *July* 1807, called upon by the treasurer to know how the account stood; and made it out; by which a balance appeared to be due to the company of above 1000*l.*; which he told the treasurer that he could not pay, but that his sureties must. The defendant, having been informed by *Ella* of this balance against him, required time to look into the account, and was to endeavour to settle it. *Ella* also proved that he had debited himself with the amount of the tonnages when due whether he received them or not; and that many of them he did not receive; but was in the habit of giving credit for them to different persons with the knowledge and consent of the treasurer. That he attended the meeting of the committee, who audited their books once a year. And *Ella* produced in court the book by which he accounted to the treasurer for the tolls received, and which was at all times ready for his inspection; and which contained the initials of the treasurer and his clerk denoting receipts of money from *Ella*. Neither the treasurer, nor the company, ever complained of any deficiency in *Ella*'s accounts till *July* 1807, when he communicated

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cated it to his sureties; though the treasurer might every year have ascertained the balance due to the company: and there was no difficulty in detecting the errors when the accounts were settled. On the part of the defendant it was contended, that the action did not lie in the name of the company, they having been paid all the arrears for which the action was brought by their treasurer, who, by this action, brought in the name of the company, was endeavouring to recoup himself in damages against *Ella*'s surety. But the learned Judge said he could not notice that defence upon this record. It was next contended, that the sureties were discharged by the treasurer's not having given notice to them of *Ella*'s being so much in arrear in his accounts, and by suffering him to run so much in arrear. But that was also ruled to be no defence at law, and only available, if at all, in equity; where the general principle was, that if an obligee enlarged the time of payment to a principal, without the consent of the sureties, the latter were discharged. But whether that had ever been extended so far as
[39] to hold that sureties were discharged by an obligee's neglecting to call upon the principal so soon as he might; or by not giving notice to the sureties that their principal had not paid, might be doubted. But that in this case it appeared that the sureties had notice immediately after the deficiency was discovered; and that till that time the treasurer had a good opinion of and did not suspect *Ella*. There was no proof of *Ella*'s having ever rendered any account to the committee: and the defendant's counsel declined going to the jury either upon the fact of the request to account, or the quantum of the demand: but, reserving the questions of law, or any remedy in equity, it was agreed that only one sum of 500l. should be taken in execution upon this and another action against the other surety.

Vaughan Serjt., having before obtained a rule nisi for a new trial, was now called upon to support his objection to the verdict, and to point out to which of the pleas he meant to apply the evidence. 1st, He contended that the evidence amounted to proof of payment to the treasurer, under the 2d plea, of all the sums actually received by the collector, *Ella;* though he had also debited himself with sums which he had not actually received, but which he had given credit for to different persons, with the knowledge and consent of the treasurer, which was within the scope of his duty. [But *the Court* said that there was no evidence of payment in fact to the company of the tolls received.] 2dly, He contended that the accounts having been annually audited and approved by the committee, in which those sums were set down as received, which

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which in fact had not been received; and it appearing that the errors which existed were such as might easily have been detected upon the view of the accounts when they were settled; and the treasurer might every year have ascertained the balance due to the company; either it must be taken that by omitting to examine the accounts properly, and to ascertain the balance, the committee discharged the collector, and gave credit to the treasurer; which would also amount to payment under the 2d plea: or 3dly, The committee were guilty of such gross negligence and laches, in not requiring the principal to account according to the condition of the bond from time to time, as will discharge the sureties from their obligation. For the sureties rely upon the obligees using due diligence against the principal obligor, and their omitting to do so for 8 or 9 years lulls the sureties into a false security, and prevents them from using due diligence against their principal for their own protection. And he referred to *Rees* v. *Berrington (a)*, where Lord *Loughborough* C. held that an obligee's giving time to the principal, without notice to the surety, discharged the latter.

Balguy and *Clarke*, contra, were stopped by the Court.

Lord ELLENBOROUGH C. J. The only question is, Whether the laches of the obligees in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, be an estoppel at law against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity. None of the pleas appear to have been proved in fact.

Per Curiam, Rule discharged.

(*a*) 4 *Ves. jun.* 544.

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Saturday. June 25th.

The KING *against* The Inhabitants of HELLINGLY.

A tenement found to be of the value of 4*s.* a-week, and to be demiseable at all times of the year, if let *by the week*; but not to be of the value of 10*l.* a-year, to be let *by* the *year*; cannot confer a settlement on the occupier by residence thereon for 40 days.

TWO justices by an order removed the wife and four children of *James Patterson* from *Hellingly* to *Brighthelmstone*, both in the county of *Sussex*: the Sessions quashed the order, subject to the opinion of this Court on the following case. *James Patterson*, the husband and father of the paupers, at the time of the taking and occupying the tenement hereinafter mentioned, was a private soldier in the *Sussex* mi-

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litia, quartered at *Brighton* with his regiment, which then lay in the barracks there. He had permission from his officers to sleep out of the barracks, for the purpose of being with his family; and hired a house at *Brighton* by the week, paying four shillings a week for the same, which house he so continued to occupy and sleep in with his wife and family for three months. The house so hired and occupied by him is at all times of the year of the value of four shillings a-week, if taken by the week; but is not of the value of 10*l.* per annum to be taken by the year. The question reserved was, Whether *James Patterson* gained a settlement under the above circumstances?

Courthope and *Sedgwick*, in support of the order of Sessions, contended, 1st, that the fact found in the case, that the tenement was not of the value of 10*l.* *a-year*, concluded the question: for though the letting need not be by the year, yet the value of the tenement must be estimated *by the year;* because the act 13 & 14 *Car.* 2. *c.* 12. speaks of coming to *settle*, i. e. to *reside*, on a tenement under the *yearly value* of 10*l.* 2dly, A soldier cannot gain a settlement during the time that he is on military duty in the parish. The stat. of *Car.* 2. was not made to facilitate but to restrain settlements, by enabling the magistrates to remove those who came to settle on tenements under 10*l.* a-year who were likely to be chargeable: but a soldier could not have been removed at any rate, either before or after that act, and therefore could not gain a settlement by residence on a tenement of that value under the act, not being within the intention of it. And this is confirmed by the clause in the mutiny act, enabling every soldier to be examined as to his settlement; which examination is conclusive ever afterwards, and he cannot be examined a second time; which shews that the Legislature considered that a soldier could not gain a subsequent settlement.

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D'Oyly and *Roe*, contra, argued that the meaning of *yearly* value of 10*l.*, in the statute, was a tenement which would produce to the owner 10*l.* in the course of a year: the *yearly* value being so called in contradistinction to the *gross* value of the tenement to be sold. The act does not speak of the yearly value "under a yearly contract," as contended for: and if such a letting as this be not sufficient, it must be argued that if a tenement in such a place as *Brighton* could not be let at all by the year, but could be let by the week, so as always to produce above 10*l.* within the year, yet it must be taken as worth nothing *by the year*. Here the value is found to be 4*s.* a week at *all* times of the year. The question might be different if that were otherwise. It may well

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well happen that for one six months *A.* would be always willing to pay 5*l.* for a tenement, and *B.* 5*l.* for the other six months; and yet it might not be worth 10*l.* to either of them,* because neither would want it for the whole year. But the true question is, How much it is worth to the immediate owner who collects the rent from the actual occupiers? and if he in fact receive 10*l.* a-year from all the tenants at different times within the year, the yearly value of the tenement must be so much: although if he be a middle man he may deduct a certain proportion of that for his trouble and profit before he makes his payment over to the owner of the inheritance. *Value* and *rent* are different things, and the word used in the statute is *value*. In *Rex* v. *Framlingham (a)* the landlord's paying the rates and taxes out of a reserved rent of 10*l.* a-year did not prevent the gaining of a settlement. So in *Rex.* v. *St. Matthew, Bethnal-Green (b)*. If the value be 10*l.* a-year, though the rent be less, it is the same. In *Rex* v. *Whitechapel (c)* there was no finding of what the room would have let for by the year, but only by the week. The true question, according to *Ashhurst*, J. in *Rex* v. *Fillongley (d)*, is whether the party have sufficient credit to be trusted with a tenement of 10*l.* a-year value. 2dly, The reason why a soldier cannot gain a settlement by hiring and service, because he cannot contract for his personal service with the master, does not apply to a settlement of this kind, for which it is only necessary that he stand in the relation of tenant to the premises for 40 days, during his residence in the same parish. Officers stand in this respect in the same situation as common soldiers under the mutiny act. And however uncertain their residence may be prospectively, that cannot affect the relation of landlord and tenant, as it does that of master and servant. The residence of a tenant at will is prospectively as uncertain; and yet that is no objection to his gaining a settlement. The clause in the mutiny act relative to the examination of soldiers as to the place of their settlement is merely to facilitate the proof, without withdrawing the soldier again and again from his duty every time he changes his quarters, to examine him as to the same settlement. To make oath *as aforesaid* means to make oath of his settlement in *A.*, which he had before made oath of; but does not prohibit another examination as to a new settlement in *B.*

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Lord ELLENBOROUGH C. J. It is unnecessary to consider the second ground of argument, how far a soldier, as such, is capable of gaining a settlement by renting a tenement of 10*l.* a-year,

(a) *Burr.* S. C. 748. (b) Ib. 574.
(c) *Hil.* 26. *G.* 3. 2 *Const.* 154. (d) 1 *Term. Rep.* 460.

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year, the Court being clearly of opinion, upon the first ground, that no settlement was gained by the pauper in *Brighton*. The words of the statute enable the justices to remove any person who "shall come to settlement under *the yearly* value of 10*l*.:" that is, upon a tenement the value of which is to be estimated by its annual value, to be let by the year, at the time of the party's coming to settle upon it. It need not in fact be let for a whole year; it may be let by the week, or the day; but those lettings are only media for ascertaining the yearly value, if nothing appear to the contrary: but when it is expressly found that the tenement was not of the value of 10*l*. a-year to be taken by the year, it is impossible by any reasoning to make the matter more clear. Suppose, however, that it might be let every week in the year at 4*s*. a-week, which would amount to 10*l*. 8*s*. and a fraction; I ask whether in fair estimation that would be of equal value with a tenement of the value of 10*l*. a-year to be let by the year? Whether the difference of 8*s*. and a fraction to be made by fifty-two successive contracts would be an equivalent for so much additional trouble and inconvenience? Nobody would hesitate to say that such a tenement was not of the value of 10*l*. to be let by the year. But the statute, speaking of the *yearly* value, means the value of the tenement to be let *by the year*.

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GROSE J. agreed.

LE BLANC J. When the statute speaks of the *yearly* value, what else can be understood by that expression but the value to be let *by the year*? It has been held indeed by construction of the statute, that a settlement may be gained by a taking of a tenement for less than a year, provided it is of an aliquot value, which would amount to 10*l*. a-year. But in none of the cases where that has been decided did it appear that the estimated value depended on the mode of letting by the week or other shorter period than a year. But the letting at so much by the week or the month was merely taken as a criterion of the yearly value: and this is an answer to all those cases. Here, however, it is stated that the value of 10*l*. within the year depended on the taking being for a shorter period than a year, and no person would have paid that *yearly* value for it. If this, then, were allowed to confer a settlement, the next thing contended for would be, that a field, which nobody would take for 10*l*. a-year, if it could be let out by the tenant for one night (which he might do to drovers of cattle on the road) at that rate would confer a settlement. I am not disposed to extend the words of the act further than the cases have already gone.

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BAYLEY, J. This case is so clear, that I regret that the Sessions were prevailed upon to reserve it for our consideration. The question is, Whether the value of this tenement be 10*l.* a-year? To ascertain that, the only fair criterion is whether it would let at a single letting, without further trouble, for that sum. If it could be so let at a single letting, the landlord might reside elsewhere at a distance: but if it is to be let weekly, he must either reside upon the spot himself, and have so much additional trouble in letting it, or he must employ somebody else, and pay him for his trouble: and in either case part of the 10*l.* obtained within the year by weekly lettings would go either to compensate himself for his trouble or in defraying the expence of his agent: besides, the risk of not being able to let it for three weeks in the course of the year, in which case the actual rent would be reduced under 10*l.* a-year. The statute then, speaking of the *yearly* value, and the question being, Whether the tenement were worth 10*l.* a-year to be let at a single letting, without further trouble; and that being negatived by the case, it is clear that no settlement was gained by the pauper's occupation of it. Order of Sessions confirmed.

CUNNINGAM *against* COGAN.

Saturday, June 25th.

In the case of a defendant charged in execution, the committitur must be filed of the same term as the marshal's acknowledgement.

FINAL judgment was signed in last *Hilary* term, and in the same term the usual rule was taken out for the marshal to acknowledge the defendant in his custody: but the committitur, under which the defendant was charged in execution, was not filed till *Easter* term. And * because the committitur was not filed in the same term as the judgment, a rule was obtained, upon the authority of *Fisher* v. *Stanhope (a,)* calling on the plaintiff to shew cause why it should not be taken off the file, and the defendant be discharged out of the custody of the marshal.

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Hullock, in shewing cause, observed that in *Fisher* v. *Stanhope* the committitur was not filed till the third time; but that here it was filed in the next term after final judgment; which was in time, according to the practice, to charge the defendant in execution. That the rule for the marshal to acknowledge the defendant in his custody need not have been taken out till *Easter* term; but that would not hurt, as the committitur was the material thing.

(*a*) 1 *Term. Rep.* 464.

Comyn,

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Comyn, contrà, (in answer to a question from the Court, how the marshal's acknowledgment was material to the regularity of the committitur) answered, that formerly the prisoner was brought up in person, and committed by order of the Court to the custody of the marshal in court; but that now a rule is made out, and served on the marshal, to acknowledge that the defendant is in his custody, and the marshal's acknowledgment is made on that rule; and therefore it was necessary, for consistency sake, that the acknowledgment of the marshal should be of the same term as the committitur; and until such acknowledgment the marshal would not be liable for an escape. And therefore *Ashhurst* J. delivered the opinion of the Court in *Fisher* v. *Stanhope*, that the acknowledgment ought to be *of the same term* [48] in which the defendant was charged in execution and that the preceding acknowledgement given in that case two terms before was not sufficient. If the plaintiff did not mean to charge the defendant in execution till *Easter* term, he should have waved the former and taken out a new rule in that term.

Lord ELLENBOROUGH C. J. The committitur proceeds on the acknowledgment of the marshal in an antecedent term, and is therefore irregular, on the authority of the case cited.

Per Curiam, Rule absolute *(a)*.

(a) Vide the forms of the rule on the marshal to acknowledge, &c. of the committitur-piece, and of the entry of the committitur, 3 *Tidd's Practice, Appendix.*

Saturday, June 25th.

RYAL *against* RICH.

A landlord declared in debt, 1st, for the double value, 2dly, for use and occupation: the tenant pleaded nil debet to the 1st, and a tender of the single rent before action brought to the 2d count, and paid the money into court: which the plaintiff took out before trial and still proceeded: and held that this was no cause of nonsuit, as upon the ground of such acceptance of the single rent being a waver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury; and that the plaintiff's going on with the action after taking the single rent out of court was evidence to shew that he did not mean to wave his claim for the double value, but to take it pro tanto.

It seems that though the single rent were paid into court on the second count, yet if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so paid in deducted out of the larger sum recovered.

THE plaintiff declared in debt, for that the defendant, before and on the 25th of *December* 1805, held a messuage and lands called *North Allson*, as tenant from year to year, of which the reversion was in the plaintiff; that on the 20th of *December* 1804 the plaintiff gave the defendant notice in writing to quit

quit the premises and demanded the possession thereof on the 25th of *Dec.* 1805, when the interest of the defendant determined nevertheless the defendant refused to deliver up possession according to the notice, and *wilfully* held over, &c. against the statute: and then the plaintiff averred the yearly value of the premises to be 80*l.*, and demanded 200*l.* as the double value, during the time the defendant so held over. There was a second general count for the use and occupation of a certain other dwelling-house and lands held by the defendant of the plaintiff by his sufferance and permission. The defendant pleaded as to 200*l.* demanded in the first count, and 112*l.* 10*s.* parcel of the 200*l.* demanded in the second count, nil debet: and as to 87*l.* 10*s.* residue of the 200*l.* in the second count, he pleaded that after it became due, and before the exhibiting of the plaintiff's bill, viz. on the 25th of *March* 1807, he tendered the same to the plaintiff, who refused to receive it: and in another plea, he stated the tender of 17*l.* 10*s.* on the different quarter-days on which the same became due, (making in the whole 87*l.* 10*s.*) as *rent* for the premises mentioned in the *second* count, from the 25th of *March* 1806 to the 25th of *March* 1807, (the last quarter-day before the commencement of the action); which the plaintiff refused to accept, and the defendant now brought the same into court. The plaintiff in his replication joined issue on the nil debet, and admitting the tender as pleaded took the money out of court on the 24th of *July* 1807. The cause was tried at *Launceston* in *March* 1808, when the plaintiff proved the tenancy by payment to him of rent by the defendant, and the notice to quit as laid, and that the annual value was 70*l.*, and that the defendant rented no other premises than *Allson* estate of the plaintiff, for which the rent had been tendered before the action, and paid into court. Sergeant *Marshall*, who tried the cause, thereupon nonsuited the plaintiff; being of opinion that as he had received the rent paid into court upon the second count, which appeared upon the evidence to be for the same premises and for the same period for which the double value was claimed, he had waved his title to the latter, and that the jury could not, in addition to the single rent so received, find a verdict for the double value.

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Moore in the last term obtained a rule nisi for setting aside the nonsuit, on the ground that the acceptance of the single rent upon the general count for use and occupation was no waver on the record of the double value sought to be recovered by the first count for wilfully holding over. And whether it were a waver in fact was a question for the jury to have decided.

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East, and *Adam*, jun. now shewed cause, and contended that the double value for wilfully holding over premises, after notice to the tenant to quit, was given by the stat. 4 *G.* 2. *c.* 28. in the nature of a *penalty;* for it provides that "against the recovery of the said *penalty* there shall be no relief in equity." In such an action therefore the landlord disaffirms the tenancy of the defendant, and proceeds against him as a trespasser and wrong-doer: and on that ground the Court, in *Soulsby* v. *Neving*, (*a*) held that there was no inconsistency in maintaining this action after a recovery of the same premises in ejectment; though they doubted whether after recovery in ejectment an action would lie for double *rent* upon the stat. 11 *Geo.* 2. *c.* 19. in which the tenancy was recognized. Upon the same principle the acceptance of rent, *quà rent*, by a landlord, by which he recognizes the tenancy and
[51] lawful possession of the tenant for the period during which the rent accrued, is clearly inconsistent with the action for double value during the same period, in which action the defendant is treated as a trespasser and wrong-doer. Wherefore in *Cobb* v. *Stokes* (*b*) the court held that if the landlord took his verdict for the double value from the middle of a quarter when the possession was demanded, he could not recover the single rent for the antecedent fraction of such quarter (the rent having been before reserved quarterly) upon the general count for use and occupation, as upon an implied tenancy, with reference to the former holding. Now here the plea of tender of *rent* (which could only be pleaded to the count for use and occupation; for it would have been no answer to the count for wilfully holding over after notice to quit, to which another answer would have been given at the trial if the cause had proceeded) covered the whole period for which the double value was claimed in the first count; and the acceptance of the tender, which adopts the terms and character of it, must be taken to be an admission by the landlord that the defendant held the premises mentioned in the second count as tenant to him during the whole period for which the rent was claimed, and that he received the tender as of *rent* for the same premises. And then, when it was proved at the trial that the defendant held no other premises of the plaintiff but those for which he had already received such rent under the general count for the very same period this operated, not indeed as a legal estoppel upon the record to his recovery of the double value or penalty upon the first count, but as a waver of the penalty in fact, as a waver of the notice to quit, and as a waver of the demand of possession under the stat.

(*a*) 9 *East*. 310. (*b*) 8 *East*, 358.

4 *Geo.* 2; because the seclaims, founded only, as they are, upon the ground of a tortious possession, are inconsistent with the recognition of a lawful tenancy during the same period. And the tender having been made upon the count for use and occupation only, it was not competent to the plaintiff when he took it out of court to say that he meant to apply it to the first count for wilfully holding over (to which it could not apply), and that he only received it in part satisfaction of the penalty, and not as rent.

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Lord ELLENBOROUGH C. J. In this action the plaintiff claims first to recover a statutable compensation from the defendant, for holding over the possession of the premises after the expiration of a notice to quit and demand of possession; and, 2dly, to recover so much for use and occupation, upon the conventionary stipulation of the parties. The first claim arises out of the compensation given by the stat. 4 *Geo.* 2. and the case stands thus: If the tender of the single rent had been accepted before the action brought, it would have been a question for the jury to have determined, whether it were not a waver of the landlord's claim to the double value? If it were accepted after the action brought, it became a question with what intent it was received; whether in part satisfaction of the double value, or as a waver of it. At any rate it is no estoppel in law, but an estoppel, if at all, arising out of the acts and intents of the parties, which should have gone to the jury. There cannot indeed be a double satisfaction for the same thing; but the question is in what sense the plaintiff received the money tendered and paid into court; whether as part of the larger sum which he claimed for the double value, or as the less sum claimed for use and occupation? Now nothing appears here to shew that he was estopped from taking it as part of the larger sum claimed by the first count: and the very fact of his going on with the suit, after taking the money out of court shews, that he did not mean to take, it in satisfaction of the lesser sum. It was therefore no estoppel from proceeding for the double value.

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LE BLANC J. (*a*) It is sufficient to say that this was not a ground of nonsuit. A tender was made of the single rent before the action was brought, which the plaintiff refused to receive, and brought his action, claiming in his first count the double value, and in his second so much for use and occupation. The defendant paid the money tendered into court on the second

(*a*) *Grose* J. was absent.

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count. If then the plaintiff had not taken the money out of court, how would the case have stood? If he had substantiated his first count, he would have recovered a verdict for the whole of the double value, and got judgment and taken out execution for it. And how the defendant would have got his money out of court again I do not know. Or the plaintiff might have taken the money paid into court in part satisfaction of the money recovered for the double value, and only taken out execution for the remainder. But here he took the money out before verdict, and afterwards went on to recover the double value, deducting that sum. This case then appears to me to fall in very closely with the doctrine in *Doe.* v. *Batten* (*a*).

[54] There the landlord had received a quarter's rent, due after the expiration of the notice to quit, and after ejectment brought; but still he proceeded with his ejectment; and the question, which was considered as proper to be submitted to the jury, was whether this were a waver on the part of the landlord of his right to proceed: and it was held not to be a waver. So here the proof of the defendant having tendered the single rent and paid it into court, and the plaintiff having taking it out, but still proceeding in his action, was not a ground of *nonsuit*.

BAYLEY J. The objection taken is against the law and justice of the case. The plaintiff in his first count claims the double value; and in his second count the single value of the premises. The defendant pleads a tender as of the single value, and pays the money into court on the general count. The plaintiff says in effect, I am willing to receive the single value paid in as part of the double value which I claim; but I will still go on for the remainder. There is no inconsistency in this. If then the plaintiff had recovered upon the first count, the defendant would have been entitled to have the single value paid in, deducted out of the double value recovered, and no injustice would be done. And the plaintiff's going on with this action after taking the money out of court shews, that he did not mean to accept it as a compensation for the double value, but only in part satisfaction of his demand.

Rule absolute.

(*a*) *Cowp.* 243. and vide *Doe.* v. *Humphreys*, 2 *East*, 237.

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HENDY and Others *against* STEPHENSON and Others.

Tuesday, June 28th.

TRESPASS for breaking and entering the close of the plaintiffs in the parish of *St. John the Evangelist, Westminster*, parcel of *Tothillfields*, &c. in the county of *Middlesex*, and pulling down a building there erected, &c. The defendants by their second plea justified the breaking and entering, &c.; for that the building was erected in *Tothillfields*, and that one *M. B. Wise* at the time, &c. was seised in fee of 10 acres of land, &c. contiguous to *Tothillfields*, and he and all those whose estate he had from time immemorial had right of common of pasture throughout *Tothillfields;* and because the building was wrongfully erected there and incumbered the same, so that he could not enjoy his common of pasture there without prostrating it, the defendants by his command, &c. broke and entered, &c. 3dly, They justified by a similar plea under *Jeremy Bentham*. 4thly, They pleaded that the said building was erected in *Tothillfields*, and that *M. B. Wise* before and at the time of the supposed trespass was seised in fee of other ten acres of land, &c. contiguous to *Tothillfields*; and that long before the said time when, &c. by a deed made between the then owner of the part of *Tothillfields* whereon the building was erected, and in which, &c. (such owner being then and there seised in fee of such part, &c.) and the then owner of the last mentioned land, &c. whereof *M. B. Wise* was so seised (such last mentioned owner being then and there seised in fee of such last mentioned land, and whose estate therein the said *M. B. W.* at the said time when, &c. had; *but which deed is since lost or destroyed by accident and length of time, and therefore cannot be brought into court here, and the date thereof is, and the particular parties thereto are, for that reason, wholly unknown to the defendants)* the said then owner of *Tothillfields*, and in which, &c. being then and there well entitled so to do, did grant to the said then owners of the said last mentioned land, &c. whereof *M. B. Wise* was so seised as aforesaid, and the heirs and assigns of the said last mentioned owner for himself and themselves for the time being, common pasture throughout the said part, &c. called *Tothillfields*, whereon the said building was so erected, &c. and because the building was wrongfully erected, and encumbered and abridged *M. B. Wise's* common of pasture, the defendants

A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the locus in quo under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not preferred in court, of which *the date and names of the parties are unknown.*

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defendants justified breaking and entering, &c. by his command, and prostrating such building, &c. And there was a similar plea of justification under *Jeremy Bentham*. The replication took issues on the 2d and 3d pleas, and demurred to the two last; stating for special causes, that no person is described in those pleas either as the grantors or grantees of the grants there mentioned; nor is any time specified when the supposed grants were made; nor are the necessary circumstances attending them specified with sufficient certainty; whereby the plaintiffs are prevented from taking any certain issue on such grants, or on the seisin of such respective grantors or grantees, and are disabled from applying any evidence to such loose and uncertain allegations, &c.

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Dampier, in support of the demurrer, observed that this plea was a new experiment, attempted to be derived from the doctrine in *Read* v. *Brookman*, (*a*) but going much beyond it. It was there decided for the first time, that a profert of a non-existing grant might be dispensed with on a bare averment that it was lost and destroyed by time and accident. Before that determination the excepted cases were the profert of a deed in another court, (*b*) the possession of it by the opposite party (*c*), and, what was more doubtful, the destruction of it by fire (*d*); but neither the doctrine of that case, nor any just consequence to be derived from it, can warrant the pleading not only a non-existing grant but a grant of unknown parties, and without a date. If this be allowed there will be no more pleas of prescription. It will apply to rights of way as well as rights of common, and there will be no more occasion for pleas of a way of necessity: no question will hereafter arise as to unity of possession, or a release of the right. One who had such a grant would do well to burn it, as the loss of his deed would be of more advantage to him than the possession of it. If he have the deed, he must in his plea state the time, set out the parties, and shew that they had estates to make and receive the grant, and deduce the title to himself; and the plaintiff may take issue upon any of these facts: or he may reply non est factum, fraud, or duress, to the deed itself, if it be pleaded as existing, or though not existing, if pleaded with particularity, as in *Read* v. *Brookman*. So he might take issue on the seisin of the grantor or grantee, or on any part of the title. But how can that be done in the present case, where it is only

(*a*) 3 *Term Rep.* 151.
(*b*) *Wymark's* case, 5 *Rep.* 74. *b.* 75. *a.*
(*c*) *Ib.*
(*d*) Dr. *Leyfield's* case, 10 *Rep.* 92. *b.* 93. *a.*

stated

tated that an unknown owner of the land at an indeterminate time past was seised, and granted to another unknown owner of other land, who was also seised? If the parties and times had been named, a subsequent release or regrant might have been replied. The time of the grant not being specified also puts the plaintiff to great disadvantage in *evidence*. For if, in reply to [*58] such a grant pleaded, he proved a denial, or obstruction, or any decisive circumstance at any particular time, it would be answered, that the defendant's grant, not being tied down to any time, was subsequent to such fact, and therefore not inconsistent with it. But without an express authority for pleading a grant thus generally, it seems difficult to maintain on any legal principle, that a defendant who has invaded another's possession should be able to secure to himself, and deprive the plaintiff of so many advantages by this new invention. All that follows from the decision of *Read* v. *Brookman* is that the party who pleads a lost grant need not produce the parchment; but he must still aver every thing material in the grant; as in *Campbell* v. *Wilson (a)*. The former case only introduced the difficulty of detecting fraud, by withholding a view of the deed itself: but issue might still be taken on the material facts of it as there pleaded. It may be said, that as the parties, under whom the defendants justify, might have brought an action for the disturbance of their common, and have declared on their possession: by the same reason they ought, when sued, to be permitted to plead title on their possession: but there is this material distinction between the two cases, that possession itself is a primâ facie title whereon to declare generally against a primâ facie trespasser: but if a person will invade the possession of another, he ought to be prepared to state his title, when questioned for his apparent wrong- [59] ful act: otherwise it will be applying the rule of pleading in possessory actions, which was permitted in favour of possession, to pleas defending the invasion of possession, and justifying it on the ground of title: and these are the more necessary to be pleaded strictly, inasmuch as they bind the right between the parties, which a declaration on the possession does not. If, however, the defendants' argument were of any weight, it would prove that they might merely have pleaded their possession of a right of common over the locus in quo, without more; and this would extend to all cases, whether of prescription or of grant.

Abbot, contrà, said, that most of what had been urged against this plea had been urged, but without effect, in *Read* v. *Brook-*

(*a*) 3 *East*, 294.

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man. There indeed the names of the parties to the deed and the time was stated in the plea: but if the instrument be lost, so that the party pleading cannot produce it, he may not be able in fact to state the names or the dates. And it would be a strange inconsistency in the law that a defendant should not be able to justify himself under the same title on which he might have brought his action on the case for interrupting him in the enjoyment of his right of common. For there it would have been sufficient for him, as plaintiff, to have shewn an interrupted possession and enjoyment of it for a long period back, and a grant would have been presumed. Finding, however, the opinion of the Court decidedly against him, he declined arguing the case further.

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Lord ELLENBOROUGH C. J. The distinction between declaring in a possessory action, and justifying upon title in a plea to an action of trespass, has been stated and allowed: but this luxuriant shoot from the stock of *Read* v. *Brookman* cannot be supported. If this were permitted to pass, we should next have an issue upon whether the plaintiff or the defendant had the more mere right of possession. I think therefore that we are warranted in relieving the defendant's counsel from the useless labour of arguing in support of the plea. The case of *Read* v. *Brookman* went a step further than the cases had gone before; and, without saying that that step should be retraced, we ought not to go a step further, but stop there: otherwise, it might really be said that this plea stated too much, and that it would be sufficient for the defendant to plead merely that he was *possessed* of the locus in quo by grant. If the deed itself cannot be produced, it may be equitable to permit the substance of it to be substituted in place of it in pleading: non in tabulis est jus: but still it must be substantiated in the material terms of it, so that the Court may see what the grant really was. If not the inconveniences suggested by the plaintiff's counsel would ensue: no issue could be taken on the parties to the grant, or their estate, nor could fraud or duress, &c. be replied. I recollect an instance within my own experience where, in an action on the northern circuit touching a water course, a grant was pleaded, upon presumption of its existence, though it could not then be found: but it was thought necessary to state the supposed names of the grantor and grantee, and the time; of all which the party gave probable evidence: and such a deed was afterwards found, verifying the presumption which had been made of it. In *Salk*. 562., the rule is

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is laid down, that the commencement of particular estates must be shewn in pleading, which was* said to be a fundamental rule that ought not to be broken upon fancied inconveniences. The science of pleading, if well understood, may rest where it is.

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GROSE J. I did not acquiesce at the time in the judgment delivered in *Read* v. *Brookman*: but so it was decided. This plea however goes much beyond that; and for the reasons which have been stated in argument by the plaintiff's counsel, I think it cannot be supported.

LE BLANC J. The plea in *Read* v. *Brookman* was framed consistently with the forms of pleading deeds, except the profert of the deed itself. Every other principle of pleading deeds was maintained; and that case only went on the supposition that the deed itself might be lost, and therefore incapable of being produced. But if this plea were allowed, the next step would be for a defendant in trespass to state merely that he was possessed of the locus in quo.

BAYLEY J. concurred.

Judgment for the plaintiff.

DE COSSON *against* VAUGHAN, in Error.

Tuesday, June 21st.

A new assignee of a bankrupt may sue in debt upon a judgment recovered by a former assignee, displaced by the Lord Chancellor; which judgment was "for damages sustained for injuries committed as well by the defendant against the bankrupt

ON a writ of error from the Court of Common Pleas, in debt, the first count stated that *Alexander De Cosson* was summoned to answer *Thomas Vaughan, assignee* of the estate and effects of Stephen Sazonoff*, a bankrupt, according to the form and effect of the several statutes, concerning bankrupts, in a plea that he render to the said, *T. V.*, as such assignee as aforesaid, 2000*l.*, &c. For that whereas, in *Easter* term 45. *Geo.* 3. one *F. Judin*, then being assignee of the estate and effects of the said *Stephen*, then a bankrupt, according to the form and effect of the several statutes, &c. in the Court of C. B. recovered judgment against the said *Alexander* for 173*l.* 5*s.* which in the said court was adjudged to the said *F. Judin*, as such assignee, for

before his bankruptcy, as also against the assignee, *as such*, after the bankruptcy." For such recovery will be presumed to have been for injuries done to the bankrupt's estate and effects. And the plaintiff may declare in a general form, as having been *duly* constituted and appointed assignee, &c.

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his damages sustained, as well by reason of certain injuries committed by the said *Alexander* against the said *Stephen* before he became a bankrupt, and also against the said *F. Judin* as assignee as aforesaid, since the said *Stephen* became a bankrupt, as for the costs and charges, &c. as by the record in C. B. appears; which judgment still remains in force, and unexecuted. And whereas after such judgment, and before suing out the original writ of the said *Thomas* (to wit) on the 24th of *February* 1807, &c. *F. Judin* was by order of the Lord Chancellor duly removed from being assignee of the estate and effects of the said bankrupt, and the said *Thomas* was duly constituted and appointed assignee of the estate and effects of the said bankrupt, and still is such assignee; whereof the said *Alexander* had notice; whereby an action hath accrued to the said *Thomas* as such assignee to demand and have from the said *Alexander* the said 173*l.* 5*s.* parcel, &c. And whereas the said *Alexander*, after the said *Stephen* became bankrupt was indebted to the said *Thomas, as such assignee as aforesaid,* in 1826*l.* 15*s.* residue, &c. for so much money by the said *Alexander* before that time
[63] had and received to and for the use of the said *Thomas as such assignee as aforesaid,* to be paid to the said *Thomas as assignee as aforesaid* when the said *Alexander* should be thereunto requested: Nevertheless the said *Alexander* hath not paid the said 200*l.* above demanded, &c.; to the damage of the said *Thomas* as such assignee as aforesaid &c. The record then stated judgment by nil dicit, and that the plaintiff remitted to the defendant his damages by reason of detaining the debt, and also his costs *(a)* and charges; and took judgment for his debt: on which error was brought, and the common errors assigned.

The questions made were two, 1st, Whether a new assignee of a bankrupt could in his own name maintain an action upon a judgment obtained by a former assignee who had been displaced by the Lord Chancellor. And if he could not, then, 2dly, whether the judgment of C. B. must be reversed in toto, or might be affirmed as to the last count of the declaration, which was admitted to be good.

Barrow argued on the first point in the negative; for the stat. 1 *Jac.* 1. c. 15 *s.* 13. only enables the commissioners to assign

(*a*) The remission of damages and costs was made in this case pro majori cautelâ, in case the first count had been held to be bad. But quære; the damages in debt being merely nominal, and the plaintiff being at any rate entitled to costs if one of his counts were good. Vide *Jacob.* v. *Mills*, *Cro. Jac.* 343, *Frederick* v. *Lookup*, q. t. 4 *Burr.* 2018. and *Cross.* v. *Kaye*, 6. *Term. Rep.* 663.

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debts due to the bankrupt, and vests the property, right and interest of the *said debts* in the assignees. And the stat. 5. *G.* 2. *c.* 30. *s.* 31., which enacts that in case a new assignment shall be ordered, "such *debts, effects and estate* of such bankrupt shall "be legally vested in such new assignee; and that he may law- "fully sue *for the same* in his own name;" cannot pass any thing which was not in the bankrupt, as part of his debts, effects and estate. But the damages recovered by the first assignee never constituted any part of the "debts, effects or estate," of the bankrupt; but were a debt created in the time of the first assignee, and suable for only to him in his own name; and could not be conveyed to the second assignee by his appointment; and consequently cannot be sued for by him, but only in the name of the first assignee, who would be a trustee for the creditors and the bankrupt's estate. [Lord *Ellenborough* C. J. If the recovery were for an injurious conversion or spoliation of the bankrupt's property, the damages recovered would not be less a part of the debts, effects, and estate of the bankrupt, because they had been converted into a judgment to his assignee.] He also objected to the general manner in which the plaintiff was stated to be assignee. By the case ex parte *Newton* and others *(a)* it appears that the former assignee should join with the commissioners in executing an assignment to the new assignee: but, as it is here stated, the plaintiff might have been appointed by the Lord Chancellor, which would not make him assignee of the estate and effects of the bankrupt, and still less of any debts which only vested in the former assignee.

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Lord ELLENBOROUGH C. J. The plaintiff is stated to have been duly constituted and appointed assignee of the estate and effects of the bankrupt, and therefore we must take it here that due means were resorted to in order to constitute him such *(b.)*

As to the second question, the case of *Hancock* v. *Haywood (c)* was referred to by Lord *Ellenborough* to shew that the judgment might, if proper, be affirmed on the last count only. In that case the damages were assessed separately on the several counts. And this objection was no further urged by *Barrow.* But a doubt having been thrown out whether the former judgment recovered might not have been for personal injuries committed by

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(a) 1 *Atk.* 97.

(b) Vide *Tully* v. *Sparkes,* 2 *Ld. Ray.* 1548. referring to *Lutw.* 274.

(c) 3 *Term. Rep.* 433. and vide *Bellew* v. *Aylmer,* 1 *Stra.* 188. and *Henriques* v. *The Dutch West India Company, ib.* 808.

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the defendant against the bankrupt, or against the former assignee, his Lordship said that the Court would not intend that: and in order to reverse this judgment it ought to appear that it was for a cause for which no action could be maintained by the present assignee *(a)*. Therefore upon the whole matter,

Per Curiam, Judgment was affirmed in toto.

Gaselee was to have argued for the defendant in error.

(b) Vide *Streatfield* v. *Halliday,* 3 *Term Rep.* 781.

[*66]

Tuesday, June 28th.

*WILLIAMS *against* SANGAR.

A turnpike act, imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage or horse exempts the traveller from paying a second time in the day for the passage of the *same carriage,* though drawn by *different horses,* being the same in number. And another clause providing that in all cases of *carriages travelling for hire,* the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages repassing with a different traveller or passenger, does not extend to *stage coaches;* the *carriage itself* not being there *hired* by the respective passengers, but only a conveyance by it: and therefore such stage coaches are freed of toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number.

IN trespass, the declaration contained two counts for taking a horse and coach of the plaintiff, and detaining them till he paid 1*s.* 6*d.* for their release: and, on not guilty pleaded, a case was reserved at the trial before *Chambre* J. at *Gloucester,* which stated in substance, That the plaintiff was proprietor of a common stage coach travelling with four horses from *Bristol* to *Gloucester,* and back again. That the passengers paid a certain fixed sum for the journey, which included every expence of the coach, except for extra-luggage, and the coachman's gratuity; all turnpikes being defrayed by the proprietors. That on the 1st of *October* 1807, the coach passed the turnpike kept by the defendant on a public road mentioned in the stat. 19 *Geo.* 3. *c.* 117. with four persons in it, going from *Bristol* to *Gloucester,* and the coachman paid 1*s.* 6*d.* the proper toll under that act, and the 37 *Geo.* 3. continuing and raising the toll: and the same coachman and coach repassed on the same day, with different passengers, and different horses, when toll was again demanded by the defendant, who on refusal distrained one of the horses, till the coachman paid 1*s.* 6*d.* for the toll. That proper notices were given under the act before the action, and no tender of damages was made. That the coach went and returned every

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day, whether there were any passengers in it or not, and also carried parcels for hire. (The case also stated a usage at this and other turnpikes near *Bristol*, as to taking toll; which was* agreed to be of no weight.) That on the 2d of *October* the same coach under exactly similar circumstances, except that it returned with the *same horses* which went through in the morning, was stopped, and a horse distrained, until the toll of 1*s.* 6*d.* was paid. The question reserved was whether the plaintiff under the clause in the act 19 *Geo.* 3. *c.* 117, (p. 599,) was liable to pay toll on the return of the said carriages on the same day as before mentioned, or for either of them: and the verdict was to be entered accordingly. By one clause of the act the toll is imposed, as usual, so much on such and such carriages drawn by so many horses; and so much on every horse, &c. By another clause "No person shall be subject to the payment of toll more "than once in any one day for passing and repassing with the "same horse, &c. or carriage, through the same turnpike: "nor shall any person be subject to the payment of toll for the "passage of any horse, &c. or carriage, in the same day through "more than one turnpike" on the several roads specified. By another clause "no person who shall have paid the toll for "the passage of any horse, &c. or carriage, through any turn-"pike gate (on certain roads) shall be subject to the payment "of any toll in the same day, for the passage of the same horse, "&c. or carriage, through any other turnpike gate" (on certain other roads). Then by the clause in question, "in all cases "of *carriages travelling for hire*, the traveller or passenger, "travellers or passengers, conveyed therein, shall be considered "as the person or persons paying the toll; and such payment "shall not exempt such carriages repassing with a different "traveller, &c. but he or they shall be liable to pay the toll, "as if the carriage had not before passed that day." *(a)*

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Wigley for the plaintiff; after observing that the coach had returned through the turnpike on the same day, in one instance with different horses and different passengers, contended that this was not *a carriage travelling for hire* within the meaning of the clause in question. The toll is put on the *carriage*, and it matters not whether it be drawn by the same or different horses in its progress and return on the same day; and the act makes no such distinction. It must of course be paid by the owner. There

(a) The same or the like clauses in substance are to be found in most of the turnpike acts.

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is a distinct toll on horses not drawing carriages. The exemption is general, that no person shall be subject to the payment of toll more than once a day for passing or repassing with the same horse or carriage. Then the clause in question, having in view post-chaises and other carriages which are hired by the stage, and which may go and return several times on the same day with different persons who have hired the same, enacts that in all cases of *carriages travelling for hire*, the traveller or passenger shall be considered as the payer of the toll; and that such payment shall not exempt the same carriage repassing with a different traveller from being liable to pay the toll. That does not apply therefore to a case like the present, where neither of the passengers can be said to be the *hirer* of the *carriage*, and where the owner or his coachman pays the toll. As it is clear that a person travelling in his own carriage, and paying the toll, [69] would not be liable to pay it again for repassing with the same carriage and different horses in the same day; so neither can it apply to a stage coach returning in the same day; the tax being imposed in both instances on the *carriage*, and not on the passengers or on the horses. [*Le Blanc.* J. Suppose the coach returns without any passengers, who shall be said to be the hirer? Lord *Ellenborough* C. J. The man who takes a place in a stage coach cannot be said to be the *hirer* of the *stage coach:* he only hires *a place in it.*]

Abbott, contrâ. It must be admitted that the usage signifies nothing in such a case; (which was acceded to by the Court.) The duty is not laid on the *carriage* in the case of public carriages let to travel for hire, but on the *traveller or passenger;* although by agreement the owner of the coach may take the payment upon himself. *Travelling for hire* is the very term made use of in the stat. 28 *Geo.* 3, *c.* 57. with respect to stage coaches, regulating the number of outside passengers. [*Le Blanc* J. Would you contend that that act included post-chaises?] The title of it sufficiently shews what description of carriages was meant: but it is sufficient to say that the same term is there used to designate stage coaches. [Lord *Ellenborough.* The term was there used as contradistinguishing public carriages.] A stage coach travels for hire, though not hired by one person.

Lord ELLENBOROUGH C. J. In the construction of these tax acts, we must look to the strict words, however we may sometimes lament the generality of expression used in them; but we [70] must construe those words according to their plain meaning, with reference

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reference to the subject matter. Now here the toll is specifically imposed on every *carriage*, &c. Though it must of course be paid by some person passing with such carriage, as it cannot be paid by the carriage itself. Then there is a clause exempting any person from the payment of toll more than once a day for passing or repassing through the turnpike with the same horse, &c. or with the same carriage. Then comes a narrowing clause, (the clause in question) whereby in all cases of *carriages travelling for hire*, the traveller or passenger conveyed therein shall be considered as the person paying the toll; and such payment shall not exempt such carriages repassing with different travellers, &c. on the same day. The question is whether a stage coach is *a carriage travelling for hire* within the meaning of this clause? Now adverting to what is the usual mode of travelling, it appears intended only to apply to post-chaises and other carriages which are frequently hired to pass and repass on the same road with different travellers, on the same day; and where the respective travellers may properly be said to have hired the carriage, each in his turn. In these cases the payment of the toll by one traveller hiring the carriage was meant not to exempt any other traveller who happens to hire the same carriage on the same day. The only difficulty which could arise in the case is founded on the similarity of expression in another act, which clearly attaches on stage coaches: but the answer has been given to that: it merely pointed to the distinction between carriages of a public nature and used for public purposes, and carriages used for private purposes. But here we must look to the difference between what strictly speaking is a traveller or passenger *hiring a carriage*, and one who only hires a *place* in a carriage, but cannot be said to hire the carriage itself. That is a distinction well understood, and where the travellers do not hire the carriage itself, but only their respective places, it appears not to be within the meaning of the clause. [71]

GROSE J. The distinction is very plain. If the owner of the carriage or of the horses or his servant have paid the toll once in the day, he is exempt from paying it again in respect of the same carriage drawn by the same number of horses, or in respect of the same horses where there is no carriage. But in the case of carriages travelling for hire, that is when the traveller hires the carriage itself, the toll is not upon the carriage, but upon the traveller in respect of the carriage so hired; and therefore if there be a different traveller hiring the same carriage and repassing the gate on the same day, though with the same horses, he

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he is liable to pay the toll the same as the first: but that is not the case with passengers in a stage coach; they do not hire the coach, but they hire their respective places in it: and the carriage itself is under the control of the owner or his servant who pays the toll. Post-chaises returning on the same day without having been again hired it is well known do not pay the toll again which had been before paid by the traveller who hired it.

LE BLANC J. Two questions are submitted to us; first, whether this were a carriage *travelling for hire* within the meaning of the clause, having the same horses; and if not, secondly, whether returning with a change of horses made any difference.

[72] Upon the first, the only difficulty is upon the same words having been used in another act to denote a stage coach; but the different intent with which that act was passed is an answer to it. But here the legislature, speaking of a carriage travelling for hire, where the traveller was not to be exempt from the payment of the toll on account of the carriage, having before paid toll on the same day when hired by another, must be understood where the whole carriage is hired. For if stage coaches had been intended to be included, it is difficult to say why they were not specifically mentioned. I do not think therefore that they were meant to be included by the description of *carriages travelling for hire*, as here used. 2dly, I do not think that the change of horses on the return of the coach makes any difference. For by adverting to the clause imposing the duty, it is imposed on every carriage, &c. and on every horse, &c.: it is not laid *on the horses drawing a carriage*, but on *the carriage drawn by so many horses*, and the toll which is laid on *horses* evidently means horses passing through the gate without drawing a carriage: where the toll therefore is upon the carriage, it makes no difference whether drawn by the same or different horses on its return. Besides, if it were otherwise, a difficulty would arise: for a stage coach might pass through one gate without any passenger: and would the toll then be payable? It might then pass through a second gate with one passenger; through a third with two or three passengers, or with different passengers: and would there be a new toll to pay at each gate as for different travellers and different hirings?

BAYLEY J. agreed upon both points.

Postea to the plaintiff.

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CHEASLEY *against* BARNES, SCHOLEY, DOMVILLE, and SHAPCUTT.

Tuesday, June 28th

THE plaintiff declared in trespass, for that the defendants on the 15th of March 1805 broke and entered his close called the *Farm Yard* at *Hayes* in the county of *Middlesex*, and there seized and took a quantity of manure, and detained it until afterwards on the same day and on divers other days between that and the day of exhibiting the plaintiff's bill, they took it away from the said close. The second count was for taking and carrying away the manure generally. The third count charged the defendants with breaking and entering other closes of the plaintiff at *Hayes* on the 16th August 1805, and trampling down and spoiling the corn, grass, and herbage, and damaging and seizing and taking crops of wheat then growing, and keeping possession of the crops, until afterwards, on the same, and on divers other days, &c., they cut down and reaped the crops and carried them away. The 4th was a general count, for taking and carrying away the corn. Pleas, 1st, not guilty to the whole: on which issue was joined. 2dly, as to breaking and entering the plaintiff's close called the *Farm Yard* in the first count, actio non, &c. because one *P. Combes* since deceased, and the defendant *Barnes* before the trespass complained of, viz. in *Easter* 43 *Geo.* 3. recovered judgment in *B. R.* against one *T. Combes* for 3000*l.*, &c. upon which on the 28th *November* 45 *Geo.* 3. a writ of pluries fieri facias issued, directed to the then sheriff of *Middlesex* for levying the* debt and damages on the goods of *T. Combes*, so that the said sheriff might have that money before the king at *Westminster* on *Wednesday* next after eight days of *St. Hilary*, to be rendered to *T. Combes* and *Barnes;* which writ afterwards, before the return and before the trespass complained of, viz. on the 12th *December* 45 *G.* 3. was delivered to the other defendants, *Scholey* and *Domville*, the then sheriff of *Middlesex*, to be exe-

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Where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in his several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification and also newly assign either the same or different matters; such replication and new assignment being double.

And the objection is sufficiently pointed at by assigning as special cause of demurrer, that each plea containing a distinct justification to the *single* act of trespass alleged in breaking and entering the plaintiff's close in the first count, &c. the plaintiff had by his

replications *and new assignment* attempted to put in issue several distinct acts of trespass in breaking and entering the same close, &c.

A sheriff justifying in trespass under a writ of fieri facias, need not shew its return; the distinction being in this respect between a justification under mesne process, and under process in execution, at least where in the latter case no ulterior process is necessary to complete the justification.

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cuted; by virtue of which they, as such sheriff, on the 14th of *December* 45 *Geo.* 3. made their warrant to the other defendant *Shapcutt*, commanding him of the goods of *T. Combes* to levy the debt and damages, &c.; which warrant was delivered to *Shapcutt* to be executed. And then the defendants aver that at the time of issuing the said writ and warrant, and at the time when, &c. there were divers goods of *T. Combes* in the said close called the *Farm Yard* in the sheriff's bailiwick; wherefore *Scholey* and *Domville*, as such sheriff, and *Shapcutt*, as their bailiff, and *Barnes* in his aid and by his command, after the making of the warrant, and *before the return of the said writ*, entered the said close, and seized and took away the plaintiff's goods therein in execution, &c. The third plea was the same in substance as the last; only stating that at the time of issuing and delivering the writ of execution to the sheriff against *T. Combes*, and at the time of issuing and delivering the sheriff's warrant to *Shapcutt*, and before the plaintiff had any thing in the close in which, &c., *T. Combes* was lawfully possessed of the said close and of divers goods then and there being therein; for which reason the defendants *Scholey* and *Domville* as such sheriff, and *Shapcutt* as their bailiff, and *Barnes* in his aid, &c. and by his command, entered the said close, then being in the possession of *T. Combes*, to seize and take in execution his said goods then being in the said close, and did seize and take them by virtue and in execution of the said writ and warrant, and detained the same there for a reasonable and convenient time in order to sell and remove the same: and that afterwards and before the expiration of such reasonable and convenient time the plaintiff became possessed of the said close, the said goods still remaining therein, and still being in the custody of the defendants in execution as aforesaid, &c. and that the defendants as soon as they conveniently could after the plaintiff became possessed of the said close, and as soon as purchasers of the said goods could be found, to wit, on the same day and year as mentioned in the first count, peaceably entered into the said close to sell and remove the said goods of *T. Combes* so being in the said close in which, &c. in their custody in execution, &c. and did sell and remove the same, &c. Fourthly, the defendants, as to breaking and entering the plaintiff's closes in the 3d count mentioned, and trampling down and spoiling the corn, &c. and damaging the soil, pleaded the same as in the last plea; the judgment recovered against *T. Combes*, and the writ of execution issued thereon to the sheriff, and their warrant to *Shapcutt*; and that

that before the plaintiff had any thing in the said closes in which, &c. *T. Combes* was lawfully possessed of the said closes, and of divers crops of wheat, &c. then and there growing; wherefore *Scholey* and *Domville* as such sheriff, and *Shapcutt* as their bailiff, and *Barnes* in his aid, &c. entered the said closes in the possession of *T. Combes* to seize and take in execution the said crops of corn then growing there, and then and there seized and took the same in execution by virtue of the said writ and warrant, and continued in possession of the same crops for a reasonable and convenient time until they should be in a fit state to be sold and cut down, reaped and taken away, and until buyers could be found, &c. and that before the said corn was in a fit state to be sold and cut down reaped and taken away, the plaintiff became possessed of the said closes, &c. and then this plea continued and concluded the same as the last.

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The plaintiff replied to the second (the first special) plea, admitting the judgment recovered against *T. Combes*, and the writ of pluries fieri facias issued thereon; but that the defendants of their own wrong, and without the residue of the cause by them in that plea alleged, broke and entered the farm-yard, close, &c. and concluded to the country: and they pleaded the like replications to the third and fourth pleas respectively. And then the plaintiff pleaded further, by way of new assignment, that he brought his action against the defendants, for that they broke and entered the farm-yard close in his possession *after the return of the writ* in the 2d and 3d pleas mentioned, viz. on the 15th of *March* 1805, for the purpose of seizing and taking the manure in the first count mentioned, then being the property of the plaintiff there found, and no part thereof being at that time liable to be seized and taken in execution of the said writ or warrant or otherwise as in the 2d or 3d plea supposed. And also for that the defendants committed the several trespasses in the introductory part of the 4th plea mentioned, on the 16th of *August* 1805, for the purpose of seizing and taking possession of the crops of wheat in the third count mentioned, then being the plaintiff's property, and no part of such crops being at that time liable to be seized in execution of the said writ or warrant, &c.

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The defendants demurred specially to the replications to the 2d and 3d pleas and to the new assignment; because each of those pleas containing a distinct answer and justification to the single act of trespass alleged in the first count, to which they were respectively pleaded in bar, and upon which pleas the plaintiff

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tiff could not by law put more than a single fact in issue; he had by his replications and new assignment attempted to put several distinct facts in issue upon each of those pleas. And because the replications and new assignment to those pleas were double and multifarious, and no one certain or definite issue could be taken on either of them. And because the plaintiff having by his first count complained of one single act of trespass as to breaking and entering the close therein mentioned, had by his replications and new assignment attempted to introduce and put in issue several and distinct acts of trespass with respect to breaking and entering the same close. And as to the replication and new assignment to the 4th plea, the defendant also demurred, and alleged for special causes, that that plea contained a distinct answer and justification to the single act of trespass alleged in the 3d count, to which it is pleaded in bar, the plaintiff had by his replication and new assignment thereto attempted to put several distinct facts in issue, &c. (the same as before).

Abbott in support of the demurrer. The plaintiff declares in his first count for one breaking and entering of his close on a single occasion. The defendants justify that breaking and entering under a judgment recovered and process of execution thereon, *before the return of the writ*, under which they took the goods. To which the plaintiff replies, admitting the judgment and writ of execution, that the defendants broke and entered of their own wrong, without the residue of the cause by them pleaded: by which he puts in issue the sheriff's warrant to levy; that the goods taken were in the close broken and entered; that they were liable to be taken in execution under that writ, and were taken before the return of the writ. (*a*) Besides which, the plaintiff goes on further, in the form of a new assignment, to plead that the defendants broke and entered the close, &c. *after the return of the writ*, for the purpose of taking the goods mentioned in the first count, which were not liable to be taken under the execution. The 3d plea and replication thereto are substantially the same. The 3d count also charges one other fact of breaking and entering of the plaintiff's closes at another time, and spoiling the crops, and damaging the soil, and keeping possession of the growing crops, and afterwards cutting down and taking them away. To which the defendants plead, 4thly, as to the breaking and entering, and spoiling the crops, and damaging the soil, the

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(*a*) *Vide* for this form of pleading *Crogate's* case, 8 *Rep.* 67.

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like justification under the judgment, writ, and warrant against *T. C.* then lawfully possessed of the close and of the crops: and then as to the keeping possession, that it was for a reasonable time till the growing crops were fit to be cut and taken away; that during this reasonable detention the plaintiff became possessed of the closes; and the defendants, as soon as they could conveniently afterwards, entered peaceably to take the goods, still being in their custody in execution, and did take and remove the same. The replication to this plea also first puts in issue all the facts therein stated, except the judgment and writ of execution, by the de injuriâ, &c. as to the residue: and then again by the new assignment the plaintiff alleges that the defendant committed the trespass mentioned in the introductory part of that plea, namely, the breaking and entering, &c. and spoiling the [79] crops, and damaging the soil, for the purpose of taking the crops, which were then the plaintiff's property, and not liable to be taken under the execution: which is in effect pleading another replication, without introducing any new fact of breaking and entering, and thereby putting the same facts twice in issue which cannot be done. It is in effect an attempt to *reply* double, when the statue only enables defendants to *plead* double: and this was held in *Adney* v. *Vernon.* (*a*) Where the declaration charges a breaking and entering of the plaintiff's close on different days, if the defendant pleaded a justification which in the form of it embraces the whole declaration, the plaintiff may by his new assignment shew that he broke and entered, on different days, and for other purposes than those justified: and there is no inconsistency in that, because the defendant's justification may apply in evidence to different days and purposes from what the plaintiff complains of.

Marryat, contrà, contended, first, that the replication was not double; for the new assignment was explanatory only of what went before, and not cumulative. It does not allege that the plaintiff brought his action as well for the trespass originally complained of as for those newly assigned; nor does it allege any new trespass; it rather confines the cause of action originally declared on. The plaintiff does not require to recover damages for more acts of trespass than one. 2dly, the duplicity, if any, is not sufficiently pointed out by the causes of demurrer stated which it ought to be with precision; as in *Lamplough* v. *Short-*

(*a*) 3 *Lev.* 243.

ridge,

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ridge, (*a*) and *Ryley* v. *Parkhurst. (b)* In *Robinson* v. *Rayley, (c)* the duplicity contended for was distinctly assigned.*

The Court were clearly of opinion against the plaintiff on both grounds. First, they held that the replication was double. It was an attempt by a new assignment to amplify the cause of action stated in the first count. The plaintiff declared in that count for one breaking and entering respectively in the first and third counts: there were several justified, and after issues taken on those justifications, he attempted to make a new assignment of other matter; which was irregular. They said it was the same as if, to an action of trespass for breaking and entering the plaintiff's close generally, in such a parish, the defendants were to plead that the trespass complained of was in a close there called *Whiteacre,* which was his own soil and freehold; and then the plaintiff were to reply, admitting that it was in *Whiteacre,* and taking issue upon the defendants' soil and freehold; and after that, should go on to state that he meant also to go for a trespass in *Blackacre:* which was not allowable. So with respect to the single act of trespass complained of in thethird count; that also was justified; and after taking issue on the matter of that justification, the plaintiff, without alleging any different fact, made a new assignment of the same matter: so that there would be two issues to be taken on the same fact. They observed that the object of a new assignment was to give the goby to all that that the defendant had pleaded, bysaying that the trespass stated and justified by the defendant was not that which the plaintiff had complained of in his declaration, but some other which is stated. Secondly, they said that the duplicity complained of was sufficiently pointed out in the special causes of demurrer, which stated that the plaintiff, having by his first count complained of *one single* act of trespass as to breaking and entering the close there mentioned, had by his replications *and new assignment* attempted to introduce and put in issue *several distinct acts* of trespass, with respect to breaking and entering the same close, &c. (*d*).

Marryat

(*a*) *Salk.* 219. *Com. Rep.* 115.
(*b*) 1 *Wills.* 219.
(*c*) 1 *Burr.* 316.
(*d*) A similar question arose in the case of *Franks* v. *Morris,* which also stood in the Paper for argument. The plaintiff declared against the defendant for an assault and battery on the 28th of *May* 1807, and throwing the plaintiff on the ground, whereby he broke his leg, and expended 50*l.* on the cure of it; and, in a second count, for the assault and battery generally. To which the defendant pleaded, 1st, not guilty. 2dly, as to the assault and battery and throw

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Marryatt then objected to the defendants' pleas, That the writ of pluries fieri facias, under which they justified, though returnable long before the action brought, was not shewn to have been returned, as required by the terms of it. It has been suggested that this is only necessary in the case of mesne, and not in the case of judicial process: but in *Freeman* v. *Bluitt (a)* it was said that the sheriff cannot justify under a fieri facias or capias without shewing the return of it. The true distinction is between a justification by the principal officer himself, and by his bailiff: the former must shew the writ returned, but not the latter: and it is more necessary in this case than in any other, where the sheriff has made a partial execution only. [Lord *Ellenborough* C. J. asked if he were aware of the case of *Rowland* v. *Veale (b)*; where, in the case of a justification by the party and officers; under a writ of capias ad satisfaciendum issued out of an inferior court, it was held not necessary to shew the return of the writ.] There may be a difference between an execution against the person, which is final, and an execution against the goods, which may be executed at different times: and at any rate that case stands singly against the other decisions. And it is the more necessary for the sheriff to justify himself strictly in this case, where the previous entry and seizure by the sheriff of the growing crops is afterwards to be enforced against a purchaser who comes in without knowledge of the impending execution.

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Lord ELLENBOROUGH C. J. The case of *Rowland* v. *Veale* is an answer to this objection, where the distinction was taken generally between mesne process, and process in execution, and that in the latter case it was not necessary to shew the return of the writ. I would only add to what is there stated, that if any

ing on the ground, in the first count mentioned, he pleaded son assault. The plaintiff replied, as to the second plea, and the several introductory trespasses there attempted to be justified, that the defendant of his own wrong, and without any such cause as in that plea mentioned, made the assault and committed the several trespasses in the introductory part of that plea mentioned: and concluded to the country. And then new-assigned that the defendant beat him and threw him on the ground, in manner and form as the plaintiff had complained of, in a more violent and unreasonable manner than was necessary for the defence of himself, as in the second plea mentioned, and when it was not at all necessary, and thereby wounded him, &c. To which there was a demurrer, assigning the same special causes as in the last case. And after the decision of that case, the argument of this, which was admitted to involve the same question, was abandoned, and leave was prayed by the plaintiff's counsel, and given by the Court, to amend.

(a) *Salk.* 410. and 1 *Ld. Raym.* 632.

(b) *Cowp.* 18.

ulterior

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ulterior process in execution against the goods is to be resorted to, to complete the justification, there it may be necessary to shew* to the Court the return of the prior writ of fieri facias, in order to warrant the issuing of the other. But if no ulterior process be required, it can be no more necessary to shew the return of the writ of fieri facias under which the officer justifies, than of a writ of capias satisfaciendum.

Per Curiam, Judgment for the Defendants.

Wednesday, June 29th.

The KING *against* SAMUEL SHAKESPEARE.

One indicted for a misdemeanor may plead in abatement a misnomer of his surname, *Skakespear* for *Shakespeare;* which shall not be taken for idem sonans: and the plea, concluding with *praying judgment of the said indictment, and that he may not be compelled to answer the same,* is good.

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THE defendant was indicted by the name of *Samuel Shakepear,* for an assault on *F. Newberry,* at *Portsmouth;* to which he appeared by his right name, and prayed judgment of the indictment, because before and at the time of the indictment he was always called and known by the surname of *Shakespeare,* and not by the surname of *Shakepear,* by which he is indicted, &c. Wherefore he the said *Samuel Shakespeare* prayed judgment of the said indictment, and that he may not be compelled to answer the same. To this there was a general demurrer and joinder.

Lawes objected to the plea, 1st, That a defendant in an indictment cannot plead in abatement a misnomer of his surname, 2 *Hawkins's P. C. ch.* 25 *s.* 68. *(a).* The * reason probably is that surnames may be assumed or laid aside at pleasure. [Lord *Ellenborough*

(a) The Court asked what authority was cited in the book for this? The quotations are as follow: 1 *Hen.* 5. 5, which was a case of treason; but the rule is there laid down generally, that one indicted of felony cannot plead a *misnomer. Hale's Sum.* 243, which cites the above, and applies the same rule, as to misnomers of surnames, to treason and felony. *Staunf. P. C.* 181. *cap.* 13., which agrees with the Summary. 3 *Hen.* 6. 26., which is an obiter dictum of the same rule as applied to a misnomer of the baptismal name in felony. *Thel. B.* 11. *c.* 5. *s.* 14. and *Rex* v. *Sherman, Idle, and Others, Rep. temp. Hardw.* 303., where, to an indictment for a misdemeanor, *Idle* pleaded a misnomer of his surname in abatement: and for want of a replication by the king's coroner, judgment was entered, that he be dismissed and discharged from the premises specified in the said indictment: and that he depart without day. And the prosecution went on against the other defendants, who pleaded not guilty and went to trial.

Lord *Hale,* 2 vol. *P. C.* 175-6. after stating that the rule as laid down in 1 *H.* 5. 5. and in *Staunf. P. C.,* that a mistake of the surname in an indictment shall not abate it, adds a *quære;* and afterwards says that it is the safest way to allow the

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Ellenborough C. J., after noticing the authority of Lord *Hale*. as leading to a different conclusion from that which had been drawn by *Hawkins*, observed, that the argument now used would go to shew that the misnomer of a surname could not be pleaded in abatement even in civil actions.] 2dly, This is no misnomer, being idem sonans, though differently spelt. [Lord *Ellenborough* C. J. The final *e* might not make a material difference, but the omission of the *s* in the middle makes it a differently sounding name from the true one.] 3dly, There is no proper conclusion of the plea; no prayer of judgment; and therefore the Court are not bound to give judgment, as if only an improper judgment were prayed. The conclusion is not adapted to the subject-matter of the plea; for it goes to the jurisdiction of the Court, rather than to the form of the indictment: the prayer ought to be, as was said in *Bowyer* v. *Cook* *(a)*, quod billa cassetur. [*Bayley* J. In the report of that case in 5 *Mod.* Lord *Holt* only says that the plea should begin, "Petit judicium de billa;" and afterwards, that it must have "its proper conclusion."]

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Dampier, contrà, upon the last point, observed, that the defendant, at the beginning and in the conclusion of his plea, *prays judgment of the indictment;* by which he must be understood to pray that the indictment should be quashed: and the rest of the prayer, *that he may not be compelled to answer the same*, if beyond what the defendant ought to ask, may be rejected as surplusage. But he referred to *Cadman* v. *Grendon* *(b)*, where the doctrine of the conclusion of pleas was much discussed: and there it is said that the prayer in the conclusion of a plea to the *person* is, "if he shall answer." And to a modern authority, in point, of *The King* v. *Matthew Westby*, alias *Westly*, *T.* 4 *Geo.* I. (which he read from a copy of the record *(c)*, furnished by Mr.

the plea of misnomer both as to surname and christian name. And in a subsequent page (238) he says, that if the defendant in an appeal *or indictment* plead misnomer of his surname, the plaintiff or king may aver que conus per un nosme et l'autre: and a note there subjoined observes upon the original case in 1 *H.* 5. 5. that *Fitzh. Coron.* 274., in his abridgement of it, makes a *quære*, if the misnomer were in the name of baptism. See also *Layer's* case, 6 *Sta. Tr.* 237.

(a) *Ld. Ray.* 64. 5 *Mod.* 1461.

(b) *Latch.* 178.

(c) REX *v.* MATHEW WESTBY, alias WESTLY, *E.* 3 *Geo.* 1. *Rot.* 28.—This was an information filed by the Attorney-General in *Easter*, 3 *Geo.* 1. against the defendant for a misdemeanor in assaulting one *Benjamin Carter*, a constable of the ward of *Farringdon Without* in the city of *London*, in the execution of his office, &c. To which, in the same term, *Mathew Westley*, by his attorney

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Mr. *Dealtry,*) where the conclusion* of a plea in abatement to an indictment for a misdemeanor was the same as in the present case; and one of the causes of demurrer stated was that it was inaptly formed; which was over-ruled. 1 *Com. Dig.* 31. *Abatement,* F. 18. mentions the same case; and that it was so ruled by three justices. (viz. *Pratt,* C. J., *Lyttleton,* and *Powys,*) against *W. Fortescue* J. What was said in *Powers* v. *Cook* as to the proper conclusion applies only to pleas in civil actions; and the doctrine is certainly laid down too largely in the report of Lord *Raymond,* that the conclusion must be quod billa cassetur; for that would not apply to a plea in abatement on account of the excommunication of the plaintiff. And this conclusion seems more proper where there is no apparent vice on the face of the plea, but the only objection is that in fact it does not apply to the defendant.

Lawes, in reply, said that it did not appear that the particular objection now taken was made in the case of *The King* v. *Westby;* and it is the less likely that it should, as the only special cause of demurrer there assigned was of another sort, to which the attention of the Court was probably called. The utmost strictness is required in pleas in abatement, even in civil actions, and a for-

[87] tiori in criminal cases: and therefore in *Hixon* v. *Binns* (*a*) the Court gave judgment against a plea of misnomer in abatement, because it concluded with praying *that the bill might be quashed,* instead of praying *judgment of the bill:* and *Bowyer* v. *Cook* (*b*), and all the cases shew that it is not enough that it appears by the subject-matter of the plea in abatement that the suit ought to

ney *R. H.*, appears, and says that he is the person intended by the name of *Mathew Westby* alias *Westly,* &c. and that he ought not to be compelled to answer to the information, because his right name is *Mathew Westley,* and that he was never known by the name by which he is charged in the information, &c. and this he is ready to verify, &c. Wherefore, &c. he prays judgment of the said information, "et si ipse ad informationem illam ulterius respondere compelli debeat." To this the Attorney-General, in *Trin.* 3 *Geo.* 3. demurred specially, for that the defendant pleaded by attorney, without any special warrant, &c. when he ought to have pleaded in person: and also 'quod idem placitum haud apte formatum et incertum est.' The defendant joined in demurrer, &c. "unde ut prius petit judicium de informatione prædictâ, et si ipse ad informationem illam ulterius respondere compelli debeat," &c. And on the last day of *Trinity* term 4 *Geo.* 1. the following rule was entered: "Super maturam deliberationem hic in curiâ habitam ordinatum est quod judicium intretur pro defendente."

Per Curiam."

(*a*) 3 *Term Rep.* 185 (*b*) 5 *Mod.* 146.

abate,

abate, unless there be also a proper beginning and conclusion praying a proper judgment.

Lord ELLENBOROUGH C. J. Praying judgment *of* the indictment means no more than praying judgment *on* the indictment: and if this were case of a plea in bar, the Court would give that judgment which, upon the whole of the record, appeared to be the proper judgment, though not regularly prayed for by the party; according to the opinion of *Montague* C. J. (*a*), which we had once before occasion to advert to in a case before us (*b*). But in abatement the Court will give no other than the proper judgment prayed for by the party. And if it had not been for the precedent cited of *The King* v. *Westby*, I should have been much inclined to think this plea bad in that respect; and that the prayer ought to have been that the indictment should be quashed. And without the defendant prays a particular and proper judgment in abatement, the Court are not bound to give the proper judgment upon the whole record as they would be in the case of pleas in bar. Here, however, is a precedent produced, and which appears to have undergone much consideration at the time, and was afterwards referred to by the learned Judge who complied the *Digest* as a precedent proper to be remembered; and according to that, the conclusion of this plea is good, and therefore our judgment must be pronounced accordingly: and if the prosecutor is desirous to have the question further considered, he may bring a writ of error.

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The other Judges assented: and the following judgment was afterwards entered up:

"Whereupon all and singular the premises being seen and fully understood by the Court of our said lord the king now here, and mature deliberation had thereupon, it is considered and adjudged by the said Court here, that he the said *Samuel Shakespeare* be not compelled to answer the said indictment, but that he depart hence without day in this behalf."

(*a*) *Plowd.* 66.

(*b*) *Le Bret* v. *Papillon*, 4 *East*, 502. 509. and see *Charnely* v. *Winstanley*, 5 *East*, 271.

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A widower having a daughter, placed her at 11 years of age with an uncle, by whom she was wholly maintained after that time and with whom she continued to reside after she came of age, doing service for him, but without any contract of hiring to give her a settlement of her own; the father in the mean time having gone out to service. Held that on her coming of age she was emancipated, although her father conceived himself bound as such to receive and support her if she left her uncle's; and consequently the father was capable of gaining a settlement by hiring and service for a year, as "an unmarried man, *not having a child*," (i. e. not having a child who would follow his settlement) within the stat. 3. *W.* & *M.* *c.* 11. *s.* 7.

TWO justices by their order, dated *September* 8th, 1807, removed *William Gray*, a pauper, from *Teddington* to, *Cowhoneyborne*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

The pauper *W. Gray*, being legally settled in *Cowhoneyborne* sometime after the death of his wife, who died in childbed fifteen years ago last *Whitsuntide*, went to service, and hired himself to one *Clarke* of *Cowhoneyborne*, who afterwards removed to *Teddington*, and the pauper left him at *Michaelmas* last 1806, having served him the five preceding years under a hiring for a year in *Teddington*. On the death of the pauper's wife, *W. Nightingale* who had married his sister, took to and maintained the infant, of which she had been delivered, out of kindness to the pauper; and the pauper's daughter, *Elizabeth*, then about 11 years of age, went, with the pauper's consent, to *Nightingale*, for the purpose of nursing her infant sister. The infant died in about a year; and from that time to this she has continued to live in the house of *Nightingale*, as one of the family, but doing the work of a servant. *Nightingale*, who, previously to the pauper's daughter living with him, kept a servant, would have hired a servant if she had left him: but he never hired her, or paid her any wages; though he found her in board, clothes, and such pocket money as he thought fit. The said *Elizabeth* will be 27 years of age in *June* 1808. During all the time she so lived with *Nightingale* she considered herself as liable to be sent away whenever he pleased; and he considered her as at liberty to quit him when she chose; and the pauper conceived himself as her father, bound to receive and support her if *Nightingale* ceased so to do. But the pauper was not a house-keeper at any time after he went into Clarke's service. The pauper's daughter *Elizabeth* was never hired as a servant to *Nightingale*. The question intended for the opinion of the Court was, Whether the pauper's daughter *Elizabeth* were, under the circumstances of the case, so† emancipated, as to enable the pauper to gain a set-

tlement

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tlement by his service with *Clarke* in *Teddington*, under such hiring as aforesaid?

Park, *Peak*, and *Petit*, in support of the orders, contended that *Elizabeth*, the pauper's daughter, was not emancipated from her father's family at the time of his service with *Clarke*, and consequently that he could not gain a settlement in *Teddington* by such service, not being an "unmarried person, *not having child*," within the stat. 3 *W.* & *M.* c. 11. *s.* 7. and the cases which have settled the construction of that clause. It is clear that *Elizabeth* did not live with *Nightingale* in the character of a servant, but as one of his family, and that she had not gained any settlement in her own right. And it is equally clear that the mere circumstance of her being of age did not emancipate her: for though in *The King* v. *Roach (a)* an adult leaving her father's house, *and going into service*, was held to be emancipated, as having contracted a relation inconsistent with parental control; yet Lord *Kenyon* expressly disavowed an opinion which had been attributed to him in the case of *Witton* cum *Twambrooks (b)*, that the mere circumstance of a child's attaining 21 was an emancipation (*c*). The only established cases of emancipation are, 1. by the child gaining a settlement of his own; 2. by marrying and becoming the head of another family; 3. by contracting, after being of age, a relation inconsistent with parental authority. The only question is, Whether this case fall within the last class? But here she contracted no new relation with her uncle; and her father could at any time have recalled her to him, at least before she came of age. Then whether at that time there still remained the animus revertendi on her part, and the animus recipiendi on the part of the father, are matters of fact to be collected from the acts and declarations of the father and daughter, on which it was competent for the Sessions to decide, as they have done, in the affirmative. It is plain that the parties themselves considered that the daughter was still part of her father's family; and *Grose* J. laid great stress on the intention of the parties, upon the question of emancipation, in *The King* v. *Roach* as Lord *Mansfield* had done

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(*a*) 6 *Term Rep.* 247. (*b*) 3 *Term Rep.* 355

(*c*) Lord *Kenyon's* disavowal of the opinon attributed to him in that case was qualified, namely, "*if the son continued to live with the father*: for if the son *with unbroken continuance* remain with and a member of the father's family, he is not emancipated." And the same doctrine was laid down in *Rex* v. *Sowerby*, 2 *East*, 276.

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before in *Rex* v. *Tottington (a)*. In *The King* v. *Broadhembury*, *(b)*, the father had put his daughter in the work-house at the age of 20, where she remained at the time of the order made; after which he gained a settlement in another parish which was held to be communicated to the daughter. In *Rex* v. *Woburn (c)* the child under age was actually under another controul than the father's, being a drummer in the same militia regiment with him; yet he was still considered as part of his family, being so considered by themselves. While the intention of the daughter to return to her father continued unbroken, her stay with the uncle could only be considered temporary: and in *Rex* v. *Sowerby (d)* there was a temporary absence of the son, after he was of age, from his mother's family, for three weeks during harvest-time, which was not considered as making any difference in the case. And here the residence with the uncle was by consent of the father and for his benefit. They next objected, that supposing the fact of the daughter's living apart from her father, at the time when she was of age, amounted to an emancipation, still the facts of this case would not warrant the conclusion that the father gained a subsequent settlement in *Teddinton*; for it appears that he went to serve *Clarke* in *Teddington* at *Michaelmas* 1801, under a hiring for a year; and the daughter did not come of age till *June* 1802: after which it does not appear that there was any new contract of hiring, but he went on in the service under the original contract. Now the description of the servant must be regarded at the time of the hiring and not afterwards, according to *Rex* v. *Allendale* (*e*) and *Rex* v. *Forest (f)*.

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The Court, however, considered the pauper as having lived in *Teddington* under successive yearly hirings, the first hiring being stated to be for a year: and nothing further was said upon this point. And they thought it unnecessary to hear the *Attorney-General* and *Joseph Martin* for the parish of *Cowhoneyborne*, on the principal point.

Lord ELLENBOROUGH C. J. The daughter having been originally placed, when an infant, by her father in her uncle's family, continued to live with her uncle after she came of age as part of his family; receiving no assistance from her father; and being at liberty to depart from her uncle's when she pleased and to go where she chose. She was of age, living apart from her father, having her support from sources independent of him, and

(*a*) *Cald.* 287. (*b*) *H.* 25. *G.* 3. 2. *Const.* 55. (*c*) 8 *Term. Rep.* 479.
(*d*) 2 *East*, 276. (*e*) 3 *Term. Rep.* 382. (*f*) 5 *Term Rep.* 479.

was

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was at liberty to quit her uncle when she pleased, as she herself considered. If this be not emancipation, it would be difficult to say what is so, and when it can take effect. Then if she were emancipated after she came of age, it follows that the father, by the construction which has been put upon the statute of King William, gained a settlement by the subsequent hiring and service for a year in *Teddington*, as "an unmarried person, not having any child." [*93]

GROSE J. The daughter lived apart from her father after she was 21, not under his control, nor having any contemplation of it; nor receiving any assistance from him; she was therefore emancipated when her father was hired for a year, and served in *Teddington*.

LE BLANC J. The questioned is, Whether any settlement gained by the father under these circumstances could be communicated to the daughter; for, if so, he could not gain a settlement by the hiring and service in *Teddington;* and that question depends upon this, whether the daughter continued to be part of his family at the time. On the death of the father's wife he broke up housekeeping, and the daughter was sent to her uncle, withwhom she continued to live from that time; he supplying her with clothes and pocket-money: and there she still remained after she came of age. Under these circumstances, living away from her father before and after the age of 21; he having no house of his own, nor giving her any support; I think she ceased, after she came of age, to be part of her father's family; and consequently no future settlement gained by him could be communicated to her: and if so, he gained a settlement by the hiring and service in *Teddington*. [94]

BAYLEY. J. To constitute emancipation, it is clearly not necessary for the child to have acquired a new settlement of its own: the case of *The King* v. *Roach* is in point to that; where the daughter, being an adult, by leaving her father's house and going out to service was held to be emancipated. Now where is the difference between going out from the father's house after 21 to seek a livelihood, and continuing out for the same purpose after that age, where the absence from the father is so long as it was here: the father too, during all that time, having no house of his own, and having indeed contracted a relation which precluded him from receiving his daughter at home.

Orders quashed.

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An affidavit made and signed by the printer and publisher and proprietor of a newspaper, as required by stat. 38 *Geo.* 3, c 78., which affidavit contained the names of the parties, the place where the paper was printed, and the title of it; together with the production of a newspaper tallying in every respect with the description of it in the affidavit is not only evidence by that act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be: and this, upon the trial of an information for a libel contained in such newspaper.

THE defendants were the printer and proprietor of a newspaper called *The Independent Whig*, and were tried and convicted before *Grose* J. at the Sittings in *London*, upon the prosecution of the *Attorney-General*, for printing and publishing in that paper a libel upon the Lord Chief Justice of this Court. The stat. 38 *G.* 3. c. 78. for preventing the mischiefs arising from printing and publishing newspapers, &c. by persons not known, *enacts, *s.* 1. That no person shall print or publish any newspaper until an affidavit, made and signed as after-mentioned, shall be delivered to the commissioners of stamps, &c. containing (by *s.* 2.) the names, &c. and places of abode of the intended printers, publishers, and proprietors of the newspaper, and the true description of the house wherein any such paper is intended to be printed, and likewise the title of such paper; which affidavit; by *s.* 5. shall be signed by the persons making it. By *s.* 6. & 7. penalties are given for the omission of a certain notice, and for printing, publishing, or vending any newspaper without making and delivering, &c. such affidavit. Then by *s.* 9. all such affidavits shall be filed and kept as the commissioners of stamps shall direct: and the same or certified copies "thereof shall in all proceedings civil and criminal touching "any newspaper, which shall be mentioned in any such affi- "davits, or touching any publication, matter, or thing con- "tained in any such newspaper, be received and admitted *as* "*conclusive evidence of the truth of all such matters set forth in such* "*affidavits as are hereby required to be therein set forth*, against every "person who shall have signed and sworn such affidavits," &c. "and "also, against every person who shall be therein men- "tioned to be a proprietor, printer, or publisher, &c. unless the contrary shall be satisfactorily proved." The 10th section gives another penalty against the printers and publishers, omitting to state their names and places of abode, &c. And by *s.* 11 "it shall not be necessary, after any affidavit, &c. shall have been "produced in evidence as aforesaid against the persons who sign- "ed and made such affidavit or are therein named, according to

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" to this act, and after a newspaper shall be produced in evi-
" dence intituled in the same manner as the newspaper * men-
" tioned in such affidavit, &c. is intituled, and wherein the
" names of the printer and publisher and the place of printing
" shall be the same as mentioned in such affidavit, for *the plain-*
" *tiff, informant, or prosecutor, or person seeking to recover any*
" *of the penalties given by this act,* to prove that the newspaper
" to which such trial relates was purchased at any house, &c.
" belonging to or occupied by the defendant or defendants, their
" servants, &c. or where he or they, &c. usually carry on the
" business of printing or publishing such paper, or where the
" same is usually sold." And by *s.* 17. The printer and pub-
lisher of every newspaper shall, within six days after publication,
deliver to the commissioners of stamps, &c. one of the papers
signed by such printer or publisher with his name and place of
abode; which paper shall be kept by the commissioners, &c.
and shall, on application, be produced in evidence in any pro-
ceeding, civil or criminal.

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At the trial the prosecutor gave in evidence the affidavit sworn by the defendants, with their hand-writing thereto, and delivered to the commissioners, containing all the particulars required by the act, and amongst the rest the description of the place where the newspaper was printed, which was in *London*. And an officer from the stamp-office (which is not in *London*) produced a newspaper, without stating from whence it came, containing the libel in question; which newspaper answered the whole description contained in the affidavit, and stated at the foot of it that it was printed at No. 33, *Warwick-lane, London:* and it was also proved that the defendants' printing-house was at the same place.

Clifford now moved for a new trial, on the ground, principally of the want of evidence that the defendants had published the libel in *London*. The 9th clause, he contended, only made the affidavit evidence of all matters set forth therein; and these, by the 2d clause, are only the names, additions, descriptions, and places of abode of the printers, publishers, and proprietors, the description of the house where the paper is intended to be printed, and the title of such paper. But this does not dispense with legal proof that the libel contained in any such paper has been published in the county where the trial is had: for a paper may be printed in one place, when the act of publication may be in another. And the defect of proof in this respe is not sup-

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plied by the 11th section, which is confined to actions or informations for *penalties* given by the act, and cannot affect the construction of the 9th or general clause, which extends to "all proceedings civil and criminal, touching any newspaper." Then as to the 17th clause, the object was that by comparing the newspaper so delivered to the commissioners with any other of the same impression, published in the county where the trial is had, the printing and publication might be brought home to the parties described in the stamp-office documents: but it could not be intended that a publication to the commissioners, under the express direction of the act, should be deemed a libellous and guilty publication, without any other evidence of publication in the same place. As in the case de libellis famosis (*a*), and in *Lamb's* case (*b*), the delivery of a libel to a magistrate for the purpose of investigation, being enjoined as a duty, was not considered as a criminal publication. And, besides, the newspaper was only produced by an officer from the stamp-office, without any proof how it came there, or from whom it was received.

[98] Lord ELLENBOROUGH C. J. declined giving any opinion; and the rest of the court were clearly satisfied that there was sufficient evidence not only of the publication, but of the publication in *London*. The reasons were most fully stated by

BAYLEY J.: who said—As to the evidence of publication, the statute was passed, as the title of it states, for the purpose of "preventing the mischiefs arising from printing and publishing newspapers by persons not known:" and it was meant to facilitate the proceedings, either civilly or criminally, against the several persons concerned in such publications. For this purpose the act requires an affidavit to be made by the printers, publishers, and proprietors, specifying their names and places of abode, a true description of the house where the paper is to be printed, and the title of the paper. And such affidavit is made conclusive of the several facts stated in it, as against the persons signing it; unless they shew that they ceased to be the printers before the period of the particular publication complained of. Now suppose the act had stopped there, and it had been proved, as in this case, that a paper, such as is described in the affidavit made and signed by these defendants, had been published, the affidavit is made conclusive evidence against them, that one of the defendants was the printer and publisher, and the other the

(*a*) 5 *Rep.* 125. *b.* (*b*) 9 *Rep.* 59.

proprietor

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proprietor of a paper so intituled, and that it was printed at the place therein described, which is within the city of *London*: that would have been primâ facie evidence that the paper produced, tallying with that description, was published by them there; and would have called upon them to prove that it was a fabrication: and if it were, there could have been no difficulty in their making that proof. But the act goes further, and by the 11th section expressly enacts, that after such affidavit shall be produced in evidence against the persons signing the same, &c. [99] and after a newspaper shall be produced in evidence intituled in the same manner as the newspaper mentioned in such affidavit; and wherein the name of the printer and publisher, and place of printing shall be the same, *it shall not be necessary* for the plaintiff, informant, *or* prosecutor, or *person seeking to recover any of the penalties* given by this act, *to prove that the newspaper to which such trial relates was purchased at any house*, &c. belonging to or occupied by the defendants or their servants, &c. or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold. And I cannot consider, as the objection supposes, that all these descriptions of persons, namely, *plaintiff*, *informant*, or *prosecutor*, or *person* seeking, &c. apply to the same person *seeking to recover penalties given by the act:* but I take these words to apply to a *plaintiff* seeking to recover damages in an action for the civil injury sustained by him from the publication of a libel; to the *informant* in an information granted by this Court or exhibited by the *Attorney General* for the same: to a *prosecutor*, prosecuting by indictment for the libel; or, lastly, to any *person* seeking to recover penalties under the act. Therefore independent of the 11th section, I should have thought that the evidence offered was primâ facie evidence of the publication of the paper by the defendants in *London:* but, taking that section in aid, which is not confined to suits for recovering penalties, there can be no doubt that the necessity of further proof was superseded.

Rule refused.

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PLIMPTON Assignee of the Sheriff of BERKS, *against* HOWELL and Another.

Where the principal surrendered to the gaoler at the county goal, in discharge of his bail to the sheriff, before 12 o'clock on the first day of term, being the return-day to the writ, and the under-sheriff signified his assent of the surrender by return of post the next day, at the distance of 17 miles: held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment afterwards, with notice of such surrender.

THIS was an action on the bail-bond against the bail: and the principal having surrendered himself to the gaoler at the county gaol before 12 o'clock on the first day of *Easter* term, being the return-day of the writ, which surrender was not in fact accepted by the under-sheriff, who lived 17 miles off, until the next day by a letter by the post; after which the plaintiff took an assingment of the bail-bond with notice of the surrender; the question was, Whether the surrender were in time?

The Attorney General shewed cause against a rule for staying proceedings for irregularity; contending that the surrender was not effectual till the sheriff had assented to it, which was too late after the return-day of the writ. The rule is that a party who has given a bail-bond cannot surrender even before the return of the writ without the assent of the sheriff (*a*): then the assent of the sheriff after the condition of the bail-bond is broken can signify nothing.

Walton, contrà, was stopped by the Court.

GROSE J. It appears to us that the surrender was in time, and therefore that the proceedings on the bail-bond should be stayed.

[*101] *LE BLANC J. We do not mean to say that the assent of the sheriff to the surrender may be given at any indefinite time or to any person; but this was a surrender to the gaoler of the county gaol before the return of the writ, and the assent of the under-sheriff was given the next day by letter, which was as soon after as the distance would reasonably admit of, to confirm the antecedent surrender.

Per Curiam, Rule absolute.

(*a*) Vide *Hamilton* v. *Wilson*, 1 *East*, 383. and vide *Jones* v. *Lander*, 6 *Term. Rep.* 753. *Stamper* v *Milbourne*, 7 *Term Rep.* 122. *Hyde* v. *Whiskard*, 8 *Term Rep.* 456. with the MS. cases there cited, and *Maddocks* v. *Bullock*, 1 *Bos. & Pull.* 325.

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THE question turned upon a plea of tender of 10*l.* in assumpsit; on which the evidence was, that the defendant, having been employed as attorney for the plaintiff, had in that character received for his use 10*l.* in part-payment, and on going from home for a time left the 10*l.* with his clerk there. That some time after the plaintiff called and demanded 16*l.* 8*s.* 11*d.*, which he said he supposed *Evans* had received; when the clerk told him that *Evans* was gone from home, and had left with him 10*l.* to give to the plaintiff when he called. The plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand. (At that time no more had been received, though the remainder has been since received by the defendant). The clerk did not offer the 10*l.* And thereupon it was objected that this was not sufficient evidence to support the plea, and *Graham* B., before whom the case was tried at *Monmouth*, being of that opinion, directed the jury to find a verdict for the plaintiff for the 10*l.*; which they did.

**Dauncey*, in the last term, moved for a new trial, on the ground that the declaration of the plaintiff, that he would not receive the 10*l.* left with the clerk, excused the latter for not holding the money out to him in his hand, and made the offer to pay it a sufficient tender in law. And he referred to *Douglas* v. *Patrick (a)*, where the evidence of the tender, which was held to be good, (though joined with another sum on a different account, no objection being made on that account,) was that the defendant said "he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying both the demands;" but the plaintiff then told him, "that he need not give himself the trouble of offering it; for he would not take it, as the matter was then in the hands of his attorney." As to which Lord *Kenyon* said, that it was no objection to the tender, that the money was not actually produced, because what was said by the plaintiff superseded the necessity of it. He now supported his rule on the same ground; being called upon by the Court, who thought it unnecessary to hear *Abbot* contrà.

Lord ELLENBOROUGH C. J. The learned Judge's direction was right. The actual production of the money due, in monies

To make a legal tender there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. Therefore where the defendant, on departing from home left 10*l.* with his clerk for the plaintiff; of which the clerk informed the plaintiff when he called and demanded a larger sum; and the plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand; but *the clerk did not offer the* 10*l.*: this was held to be no tender.

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(a) 3 *Term Rep.* 683.

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numbered, is not necessary, if, the debtor having it ready to produce and offering to pay it, the creditor dispense with the production of it at the time, or do any thing which is equivalent to that. But here, on the contrary, it is expressly stated, that the clerk *did not offer the* 10*l.* He only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it: which is not a tender in law.

[103] GROSE J. Either there must be an actual offer of the money, or the party must be ready to pay it at the time when the actual offer of it is dispensed with.

LE BLANC J. There must either be an actual offer of the money by one party, or a dispensation of such offer by the other: and here there was neither.

BAYLEY J. was of the same opinion, and referred to the case of *Dickinson* v. *Shee,* before Lord *Kenyon,* 4 *Esp. N. P.* 68., in confirmation of it. There the defendant went to the plaintiff's attorney, and saying that he was come to settle with him the plaintiff's account, produced a paper containing the statement of the account, in which he made the balance 5*l.* 5*s.*, which *he said he was ready to pay, but produced no money nor notes.* The plaintiff's attorney said he could not take that sum, as his client's demand was above 8*l.* This was held to be no tender: for there should have been an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money as he would not accept it.

Rule discharged.

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PEACOCK, Administratrix of PEACOCK, *against* HARRIS.

A collector or renter of turnpike tolls though illegally appointed, without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that she should have *the remainder* next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls.

THE plaintiff declared, in assumpsit, that the defendant was indebted to the intestate as farmer and renter, appointed according to the statute, of the tolls payable at a certain turnpike-gate, and at certain cranes, engines, and weighing-machines there

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duly erected, for cattle and carriages of the defendant, which had travelled upon the turnpike-road and through the gate, and for other carriages of his, which had travelled on the said road and been weighed at the engines, &c.: and that being so indebted, he promised payment to the intestate, &c. There was another count for the gate tolls only, and a third on an account stated with the intestate. And there were three similar counts on promises to the administratrix. At the trial before *Chambre* J. at *Hereford*, the clerk to the turnpike commissioners produced their book, by which it appeared that on the 3d of *May* 1803 the gates, &c. in question were let by them, in the mode prescribed by the statute, to *Peacock*, the intestate, for one year; after which he continued tenant, not under a fresh letting, in the form required by the act, but under a written contract produced from the papers of the commissioners, dated 1st of *May* 1804, signed by the intestate, and one *Mill* as his surety; under which the intestate paid his rent to the clerk; the last payment being made by the plaintiff on the 24th of *July* 1805, after the intestate's death, for the year's rent ending 1st of *June* preceding. The plaintiff's daughter then proved that she lived with her father and mother at the gate; that she kept an account of the extra toll; (*i. e.* for waggons over-weight;) that her father, the intestate, had made out an account of what was due to him from the defendant, amounting to 23*l.*, which she had delivered to the defendant about two months before her father's death, who died in *January* 1805: and in *April* following she delivered to the defendant another account of 60*l.*, including charges of over-weights arising, some before, some after her father's death. That the defendant afterwards sent 5*l.* inclosed in the following letter: "Mrs. *Peacock*, inclosed you have five bills, value 5*l.*, and you shall have the remainder next week. *P. Harris. Hereford, July* 31st, 1805." The defendant's counsel insisted that the intestate had no right to the tolls; the contract, after the first year, not having been made in conformity to the act; and consequently that the plaintiff could not maintain the action. And further, that the charges for over-weights, though contracted to be let with the other tolls, could not be so let. But it is unnecessary to enter into the latter objection, as it depended on the particular wording of the clauses in the act, and ultimately the Court thought it was not well founded. The jury found a verdict for the plaintiff for the amount of the first bill delivered, deducting the part payment; and the defendant had leave to move the Court to enter a nonsuit; which was done accordingly in the last term.

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Dauncey

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Dauncey and *Wigley* now shewed cause against the rule for entering a nonsuit, and admitted that the collector was not duly appointed under the act, and therefore that the special counts could not be maintained; but they relied upon the account stated, evidenced by the written account of the tolls sent in to
[106] the defendant by the intestate, and by the defendant's part-payment of 5*l.*, and promise to the plaintiff to pay the remainder.

Abbott, in support of the rule, objected, amongst other matters, 1st, That the trustees must either let the tolls in the form required by the act; which it was admitted had not been pursued, and therefore no title passed to the lessee; or he can only be considered as their servant, appointed to collect the tolls for them; and then this action could not be maintained in his right. 2dly, If there were no original right of action in the plaintiff's intestate, the accounting to him or to her, would not give her a right to recover as upon an account stated. 3dly, There was no evidence of an account stated; to constitute which there must be a demand on the one hand, which is acceded to on the other: but it does not appear that the letter referred to the prior demand made for the tolls.

Lord ELLENBOROUGH C. J. The first question is, Whether any account were stated at all between these parties? The evidence of this on the one side are the accounts sent in to the defendant; on the other, the letter from the defendant to the plaintiff after her husband's death, in which he incloses 5*l.*, and says that she shall have the *remainder* next week. Now that must refer to *the remainder* of *some* account previously in the contemplation of the parties, which, not being specified in the terms of the letter, was to be ascertained by the jury from the rest of the evidence, and the circumstances of the case; and they by their
[107] verdict have ascertained it to relate to the account of the tolls, which it appears was before that time sent in to the defendant: and that is evidence of an account stated between them. Then it is said that this account was stated, with respect to the intestate, in a character in which by law it could not exist, because he was not legally appointed collector of the tolls. But if the defendant accounted with him in that character, having received credit from him as such, thereby admitting him to be a person to be accounted with for the tolls, he shall not now be permitted to dispute his title to recover the balance of that account. In like manner as a tenant is taken to admit the title of the landlord under whom he holds, and which he is not permitted afterwards

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to dispute. It is a different question, whether the commissioners might not dispute the intestate's title to receive the tolls: though that might be the ground of an equitable account. But I do not think it necessary to resort to the ground of an equitable account stated; for I go upon this, that the defendant has recognized the title of the party with whom he has accounted. Therefore finding nothing illegal in the items of the account, no breach of duty in the intestate, no compounding of the tolls in fraud of the act of parliament, but only giving credit for them to a future day: no collusive bargain in prejudice of the commissioners; and considering that the defendant, who has accounted with the plaintiff, has thereby recognized her title to receive the tolls on account of the intestate, I think the verdict ought to stand.

GROSE J. was of the same opinion.

LE BLANC J. I am glad that a medium of proof has been found to sustain the justice of the case. It was a question for the [108] jury to decide, whether by the defendant's having received the account of the tolls, and making no objection to it, he did not recognize that so much was due from him on that account. But it is said that there is a fundamental objection to the character in which the plaintiff sues; for that the intestate, not having been legally appointed collector, must be taken to have received the tolls merely as the servant of the trustees. But as neither the trustees nor the creditors of the turnpike make any objection to his title, shall it be permitted to a third person, after having treated with the intestate as a person legally entitled to receive the tolls, and having actually settled an account with him for the amount, shall it be permitted to such an one now to object to the plaintiff's recovery, not upon the special count, but upon the account stated? It has been also objected, that the tolls are not the subject of an action, but, if refused, could only be levied by distress upon the carriage, &c. when passing. The act, however, only says that they shall not be compounded for; it does not say that credit shall not be given for them, where there is no collusion. Therefore when the jury have found that the defendant has accounted with the plaintiff for these very tolls upon the footing of the intestate's title, he shall not be permitted now to dispute that title upon the count for the account stated.

BAYLEY J. concurred.

Rule discharged.

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If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death, if he could have been examined to it in his life-time. And therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.

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HIGHAM, and ELIZABETH his Wife, *against* RIDGWAY.

UPON error brought to reverse a recovery suffered by *Wm Fowden*, the younger, of certain lands in the county palatine of *Chester*, of which he claimed to be first tenant in tail under indentures of the 16th and 17th of *December*, 1763, it appeared that the premises were limited in remainder to the first son of the body of *Wm. Fowden*, the father, in tail, with remainder to the second and other sons in tail, remainder to the daughters in tail: under which last limitation the plaintiff *Elizabeth* claimed, in default of heirs male of *Wm. Fowden* the father, as heir of the body of *Mary*, his only daughter. The record set forth the recovery, which was of the session at *Chester*, on the 16th of *April* 29 *Geo.* 3., and appeared to have been acknowledged at *Macclesfield* on the 15th of *April* 1789, and that an affidavit was sworn on that day by *Wm. Morley*, *Wm. Fowden* sen., and *Mary* the wife of *John Orme*, in which *Wm. Fowden* sen. swore "that *Wm. Fowden* the younger was born on the *second* of *April* 1768, but that being a protestant dissenter, no entry was made of his baptism in any register." And *Mary Orme* swore that "she was aunt to *Wm. Fowden* jun., and well remembered that he was born in the beginning of *April*, and before the 15th day of that month in the year 1768." And the error assigned was that it appeared in the record, &c. that *Wm. Fowden* jun., on *Friday* in the aforesaid session at *Chester*, appeared by attorney and warranted the tenements, &c. to *E.* (the tenant), &c.: but that *Wm. Fowden** jun. was then an infant within the age of 21 years, viz. 20 years and no more. And on joinder in error, the issue was, "Whether *Wm. Fowden*, the younger, at the time of his appearance and warranty, and voucher to warranty, and also at the time of the giving of the said judgment (of recovery) was an infant within the age of 21 years, to wit, of the age of 20 years and no more."

At the trial at *Chester* it appeared that *Wm. Fowden* jun. died on the 31st of *December* 1792, having before made his will, and *Wm. Fowden*, sen. the father, died on the 20th of *March* 1806; but *Mary Orme*, the aunt, was still living, and examined as a witness by the defendant in support of the fact as sworn to in her affidavit; but the accuracy of her recollection as to the precise day of her nephew's birth was rendered doubtful by circumstances which came out upon cross-examination. And on the part of the plaintiffs

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plaintiffs it was, amongst other things, proved by a neighbour that *Wm. Fowden*, the father, and his wife, lived at *Bramhall*, where *William*, the son was born; that it was on a *Friday*. That he was desired by the father to fetch Mr. *Hewitt*, the man-midwife, who lived at *Stockport*, about three miles and a half distant: the witness, however, had occasion to go elsewhere, and another person was sent to Mr. *Hewitt*, and on the witness's return the same evening Mrs. *Fowden* was brought to bed of a son. That the wife of *Richard Fellows*, who lived half a mile off, was also delivered on the same day. The person who was sent to Mr. *Hewitt's* corroborated this account, and knew young *Fellows* and young *Fowden* as they grew up, who appeared about the same age. Another witness also proved the birth of young *Fowden*, on a *Friday* (the particular day of the week was proved by reference to market-day and other collateral circumstances by the several witnesses), and that he saw Mr. *Hewitt* at *Fowden's* house. *Fellows*, the son also proved his growing up with *Wm. Fowden*, the son; that they used to dispute which was the eldest; but they were both born on the same day; and he had been told this by *Fowden's* father and mother. His own birth-day was on the 22nd of *April*. Other witnesses also deposed to the same effect. *John Hewitt* was then called, the son of the man-midwife who delivered Mrs. *Fowden*; and he proved the death of his father 20 years before, and produced certain books (on which the question of evidence arose) in which his father had been used to make regular entries of all matters relating to his business, with their dates immediately on his return home: and the entries in question were proved to be in his father's hand-writing. These entries were tendered in evidence to shew the precise day of the birth of *Wm. Fowden*, jun. The evidence was objected to; but the court determined to receive it, reserving the point. The entries in question (which were preceded and followed in order of time by others of the like nature) were as follows:—

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" √
" 22 *April* 1768.
38 *(a)*. *Richard Fallow's* wife. *Bramhall*. Filius circa hor. 9, matutin: cum forcipe; &c.
paid,"

(*a*) The figures 38 referred to the ledger.

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Then followed in the same page the entry in question, without any intervening date.

"℔. ✓. *Wm. Fowden* jun^{r}. (*a*) wife. 79 (*b*).
filius circa hor. 3 post merid. nat. &c."

"*Wm. Fowden* jun^{r}. 1768.
Aprilis 22. Filius natus, &c.
wife — — 1 6 1
26th. Haustus purg. — — 0 15 0
2 1 1
P^{d}. 25th ~~Oct^{r}~~ 1768."

The jury found, on this evidence, that *Wm. Fowden* jun. who suffered the recovery, was not born on the 2d, but on the 22d of *April* 1768.

Topping and *Yates* shewed cause against a rule for a new trial, and contended that the entries in question, proved to be in the hand-writing of the man-midwife, and to have been regularly made from time to time in the course of his business, were evidence of the time of the birth of *Wm. Fowden* the son, as having been made by a person possessing a competent knowledge of the fact, and discharging the party on whom he had a claim in the first instance for his medical attendance. Similar evidence has been admitted in other cases. In *Warren d. Webb* v. *Greenville* (*c*) the question was, Whether there had been a surrender of part of the estate, which was in jointure to the widow at the time of the recovery suffered by the son tenant in tail; without which there was no good tenant to the præcipe for that part, and the
[113] recovery was ineffectual for so much. It was insisted that a surrender should be presumed at that distance of time (*d*): and to fortify that presumption the debt-book of the family attorney, who was dead, was produced, wherein he charged so much for suffering the recovery, including general items for drawing and engrossing the mother's surrender: all which charges appeared

(*a*) This was the designation at that time of the father of the *William Fowden* jun. in question.

(*b*) These figures referred to the ledger, the entry in which follows.

(*c*) 2 *Stra.* 1129. (*d*) The trial was in 1740.

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by the book to have been *paid*. And this was held to be good evidence after the death of the attorney, who, if living, might have been examined to the fact. This report of the case is in the main confirmed, as to this point, by Lord *Mansfield*, in *Goodtitle d. Brydges* v. *The Duke of Chandos* (*a*); with this addition, that a receipt had been given upon the bill, which contained the articles, for drawing and engrossing the surrender. Though Lord *Mansfield* seems to have thought that Sir *John Strange* had not laid sufficient stress in his report upon the presumption arising from length of time. So rentals or stewards' accounts, with *payments* marked on them, are always received in evidence (*b*), even against third persons. In *Herbert* v. *Tuckal* (*c*), upon a question, whether one was of full age when he made his will, an entry made by his father in an almanack of the day of his son's birth was allowed by the Court, on a trial at bar, to be strong evidence: and yet that was no question of pedigree, and therefore not within the exception which allows the hearsay declarations of the family to be evidence in such cases, any more than the declaration of a father as to the *place* of his son's birth; which was rejected as evidence in *The King* v. *The Inhabitants of Erith* (*d*). [114]

Manley Serj. and *John Williams*, contrà. The question, whether these entries be evidence, cannot depend on their apparent accuracy, but on this, whether the declarations of a third person, by parol or in writing, as to a fact, which may be supposed to have been within his knowledge at the time, can, after his death, be given in evidence, merely because in the same breath or writing, he admitted that a claim of his own respecting such fact, if true, had been discharged. Ever since the case of *The King* v. *Eriswell* (*e*), it has been considered that *hearsay* is not evidence of a particular fact, except in proof of a pedigree, and that exception has always been confined to the strict fact in issue of descent or primo-geniture in proof of pedigree: and has always been rejected in collateral inquires; as of the place of birth, upon a question of settlement, in *The King* v. *Erith*. And perhaps the case of *Herbert* v. *Tuckal*, which might have been a question between the heir at law and devisee, may have

(*a*) 2 *Burr.* 1071, 2.
(*b*) 12 *Vin. Abr.* 90. tit. *Evidence. pl.* 13 and 14. *Barry* v. *Bebbington*, 4. *Term Rep.* 514. and *Stead* v. *Heaton*, *ib.* 669.
(*c*) *T. Ray.* 84 (*d*) 8 *East*, 539.
(*e*) 3 *Term Rep.* 707. (and see *Rex* v. *Ferryfrystone*, 2 *East*, 54. where the question was finally set at rest.)

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passed as a question of pedigree, without adverting to this distinction. Now here the precise fact in issue was, "Whether *Wm. Fowden*, the younger, at the time of his appearance and warranty, &c. was an infant within the age of 21 years?" &c. in which no question of pedigree is involved. But not even in questions of pedigree have the declarations of any others than members of the famly eenreceived in b evidence; and the evi-

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dence given here was of the declaration of a stranger; for such the apothecary must be taken to be. The admissibility, therefore, of the evidence stands wholly upon the ground that the entry made by him, taken together, discharged his own claim. All the cases on this head rest upon the original authority of *Warren d. Webb* v. *Greenville* (*a*), which by the explanation afterwards given of it by Lord *Mansfield* (*b*), turned mainly upon the presumption of the surrender arising from lapse of time: and his very solicitude to explain this shews that he was not so well satisfied of the admissibility of the entries in the attorney's bill book, which he says was strongly litigated: and he concludes his observations by saying that Sir *J. Strange's* report is incorrect. Both in *Barry* v. *Bebbington* (*c*), and in *Stead* v. *Heaton* (*d*), the person whose entries were given in evidence had in the first instance charged themselves with the receipt of money, for which they were accountable to others, to whom their accounts were delivered: but were the entries of the receipt of rent had been made by the owner of the estate himself, as in *Outram* v. *Morewood* (*e*), they were held not to be evidence even to prove the identity of the land in a cause between other persons. And on the same principle Lord *Kenyon*, in the case of *Calvert* v. *The Archbishop of Canterbury* (*f*), ruled that an entry of an agreement for a pair of horses, made in the plaintiff's books by his servant, who was dead, was not evidence to charge the defendant for the hire of them, because the servant did not thereby charge himself. So this, being an entry made merely for the party's own use, must be considered as res inter

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alios actor. The case of *Roe d. Brune* v. *Rawlings* (*g*) went on a different ground; for there the letter written by a former steward of the estate to the then tenant for life, containing a par-

(*a*) 2 *Stra.* 1129. 2 *Burr.* 1074.
(*b*) In *Goodtitle* v. *Duke of Chandos.*
(*c*) 4 *Term Rep.* 514.
(*d*) *Ib.* 669.
(*e*) 5 *Term Rep.* 121.
(*f*) 2 *Esp. N. P. Cas.* 646.
(*g*) 7 *East*, 279.

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ticular of the ancient rents, &c. was by him handed down amongst the muniments of the estate to the succeeding tenant for life, and preserved by each *against his own interest*, as an authentic document; and on this ground it was held to be evidence of the ancient rent against the lessee of the last tenant for life, by whose acknowledgement of the fact such lessee was bound. They also noticed that the apothecary's discharge of his demand was not made upon the entry as to the time of the child's birth, but only in the ledger to which the entry referred. And they observed upon the dangerous consequence of introducing a laxity in the rules of evidence by extending the exceptions of hearsay evidence of particular facts beyond the strict question of pedigree and that class of cases where entries had been made by stewards and such like, to charge themselves in account with the payment over of sums they had received in right of others, to whom those accounts were delivered.

Lord ELLENBOROUGH C. J. I should be extremely sorry if any thing fell from the court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property: but in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognized, beginning with that of *Warren* v. *Greenville*. The question is, Whether the books of a man-midwife, attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries? That the books would be evidence in themselves as recording this event of the birth and other similar events in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion in this case formed with reference to the declarations of parents, &c. received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted; namely, that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case the party repelled by his entry a claim which he would otherwise have had upon the other for work performed, and medicines furnished to the wife; and the period of her delivery is the time

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for which the former charge is made; the date of which is the 22d of *April*, when, it appears by other evidence, that the man-midwife was in fact attending at the house of *Wm. Fowden*. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him, that his claim was satisfied. It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry, of which it is explanatory. So far, therefore, the

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case of *Warren* v. *Greenville*, if it be law, is an authority in point to the present case. But it is supposed that after the evidence of the solicitor's book there had been received, the Court had repented of their decision, and put the case to the jury entirely on the presumption of a surrender from length of time. But how does that appear, either upon the report in *Strange*, or by what fell from Lord *Mansfield* in the case in *Burrow*? *Warren* v. *Greenville* was decided in the year 1740, about 40 years after the time when it was insisted that the surrender should be presumed to have been made. And to fortify that presumption, the report says that the defendant offered the attorney's debt-book in evidence, containing charges for drawing and engrossing the surrender, which it appeared by the book were paid. This evidence was objected to, but allowed by the Court, who thought it material, upon the inquiry into the reasonableness of presuming a surrender, and not to be suspected to be done for this purpose. The entries were read accordingly. But the Court afterwards declared "that without that circumstance they would have presumed a surrender; and desired it might be noticed that they did not require any evidence to fortify the presumption after such a length of time." Now what is the fair inference to be collected from that report? not that the Court doubted at all whether the evidence of the entries in the book had been properly received; but that they were afraid, that by fortifying and buttressing up, by this further evidence, a presumption so strong from the mere lapse of time they might be supposed to have weakened that presumption; which they wished to guard against. And this is in substance the account which Lord *Mansfield* himself gives of that decision in the case in *Burrow*. But

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he also states that the point of evidence was strongly litigated; which

which shews that it did not pass without much discussion and consideration: and his account of the fact there given in evidence, so far from shewing the report to be incorrect, is a strong confirmation of it in the material circumstance. Here it appears distinctly from other evidence that there was the work done for which the charge was made: for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered: and the discharge in the book, in his own hand-writing, repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, not to discharge a claim which it appears from other evidence that he had. The evidence, therefore, in this case was properly received, as well upon the authority of the case of *Warren* v. *Greenville* as upon principle.

GROSE J. General rules of evidence are of the greatest consequence; for either admitting evidence of a fact when it should be excluded, or rejecting it when it ought to be admitted, would shake the security of all property: the right decision, therefore, of every case of this sort is of great importance. But it is very difficult sometimes to distinguish the nice shades of difference between cases of this description; and therefore I am always glad to find an express authority on which I can set my foot. The case of *Warren d. Webb* v. *Greenville* is of that sort, which ought not [120] now to be called in doubt, having been confirmed in the subsequent case by Lord *Mansfield*, and since that again by this Court. Relying, therefore, upon that authority, which applies most strongly to this case, I think the evidence was rightly admitted, and even without the entries, I think there was evidence sufficient to find the verdict which has been given, though those entries put the matter out of all question.

LE BLANC J. On inquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility by lapse of time of proving those facts in the ordinary way by living witnesses. On this ground, hearsay and reputation, (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another,) have been admitted as evidence in

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particular cases. On that principle stands the evidence in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family bibles. The like evidence has been admitted in other cases, where the Court were satisfied that the person whose written entry or hearsay was offered in evidence had no interest in falsifying the fact, but on the contrary had an interest against his declaration or written entry; as in the case of receivers' books. I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person: it is not necessary now to determine that question;

[121] but I would not be bound at present to say that they are not evidence. But here the entries were made by a person who, so far from having any interest to make them, had an interest the other way; and such entries against the interest of the party making them are clearly evidence of the fact stated, on the authority of the case of *Warren* v. *Greenville*, and of all those cases where the books of receivers have been admitted. I understand the expression used by Sir *John Strange*, in his report of that case, very differently from what they have been argued to mean. There was a presumption there of a surrender from the circumstances of the case, and from length of time; and besides that presumption so arising, there was a confirmation of it by the entry in question. The Court only said that there was sufficient to presume the surrender, without the evidence of the entry; but not that they had any doubt that the entry was evidence. And this account of it is, I think, confirmed by Lord *Mansfield* in the case in *Burrow*; who says that the point was much debated, and explains the observations made by Sir *John Strange* at the conclusion of his report. Then I cannot distinguish this from the case of *Warren* v. *Greenville*, nor from those of receivers' accounts, nor from *Roe d. Brune* v. *Rawlins*. The reasons given for admitting the evidence in the latter case apply also to the present, though I think in a much stronger degree. And I cannot agree to distinguish the entry from the ledger in favour of the objection; for in the ledger, in which *Hewit* discharges his claim, the date is mentioned; but at any rate that is not weakened by its correspondence with the other entry.

[122] BAYLEY J. This was no officious entry made by one who had no concern in the transaction: he had no interest in making it: and as he thereby discharged an individual against whom he would

would otherwise have had a claim, I think the entry was evidence by all the authorities. There were two entries read, the one following the other, without any intervening date; the first of these, relating to *Fallows*, is dated the 22d of *April* 1768; and this is marked as *paid:* the next, as to *Fowden*, is not stated there to be paid; but it refers to a particular page in the ledger, where the charge against *Fowden* is made, including items, one of which is for delivering his wife, corresponding in date with the former entry; and there he states himself to have been paid for his work and medicines. Therefore, if he had brought an action for his work, and had received notice to produce his books, this entry would have discharged the father. Now all the cases agree, that a written entry, by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself, there being no interest of his own to advance by such entry. In *Outram* v. *Morewood* the entry made was for the party's own interest who made it; for he entered the receipt of rent from another person; therefore, if that had been evidence for him, or for those claiming under him, it would have been furnishing evidence for himself of a right to the estate. But the principle to be drawn from all the cases, beginning with *Warren* v. *Greenville* down to *Roe* v. *Rawlings*, is that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his life-time. And that principle has been constantly acted upon in the case of receivers' accounts.

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Rule discharged.

HORWOOD and Another, Executors of COARE, *against* UNDERHILL.

Friday, July 1*st.*

IN debt on bond, made to the testator on the 24th of *December* 1796, for 2800*l.* the bond and condition were set out upon

The grantor of an annuity and his sureties having given their joint and several bond, whereby they bound themselves, their *heirs*, executors, and administrators, to secure the annuity, a memorial stating generally, that they *became bound* to the grantee, &c. though it may be good, without stating that they became *jointly and severally* bound, as not being inconsistent with the extent of their obligation; yet is bad, for the omission of stating the extent of the security in respect to their *heirs;* these not being bound as personal representatives are, without being named.

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oyer, by which it appeared that the defendant and others *jointly and severally* bound themselves and their and each of their "*heirs*, executors, and administrators," in the penal sum of 2800*l.*, conditioned to secure to the testator an annuity of 155*l.* 11*s.* 1*d.* during the life of the longest liver of the obligors, in consideration of 1400*l.* to them paid: and then the defendant pleaded, amongst other pleas, 2dly, That no memorial of the bond was inrolled in Chancery, pursuant to the stat. 17 *Geo.* 3. *c.* 26. 3dly, That a memorial of the bond was inrolled by the testator on the 7th of *January* 1797, which memorial was set out in the plea, wherein it is only stated that *the obligors became bound* to the testator in 2800*l.*, conditioned for payment by them, or any of them, or any of their heirs, executors, or administrators to the testator, of the annuity, &c. without stating that they bound themselves "*jointly and severally*, and their and each of their *heirs*, executors, and administrators:" and that no other memorial of the bond was inrolled. The same question was raised by the 15th plea, which stated that the defendant ought [124] not to be charged, &c. because for better securing the annuity in the condition of the bond in suit mentioned, *P. Giblet*, by his bond of the same date, became bound to the testator in 2800*l.*, for which he bound himself, "his *heirs*, executors, and administrators:" and that the testator caused a memorial of that bond to be inrolled; which does not state that *P. G.* thereby bound his "heirs, executors, or administrators." The replication to the 2d plea alledged that a memorial of the bond, such as is set forth in the 3d plea, was inrolled in time, pursuant to the statute: and demurred generally to the 3d and 15th pleas. And the defendant by his rejoinder demurred generally to the replication to the 2d plea.

Holroyd, for the plaintiff, after observing that this case arose out of the same transaction and securities, which had come before the court in *Coare* v. *Giblett (a)*; contended, 1st, that it was no objection to the memorial, that it only stated that the obligors *became bound* to the testator, when it appeared that they were *jointly and severally bound;* for stating that they were bound, generally, does not exclude the fact of their being jointly and severally bound. Nor was this held to be any objection in the former case; for the Court there were of opinion, that taking the whole of the memorial together, though it was at first stated generally, as here; yet it appeared by the recital of a sub-

(*a*) 3 *East*, 461. and again in 4 *East*, 85.

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sequent bond in the memorial, that the bond in question was a joint and several bond; and therefore there was no inconsistency, nor any untrue statement in that memorial; as in another case there cited of *Willey* v. *Cowthorne (a)*, where the memorial having stated that the obligors were *severally* bound, whereas they were bound *jointly* as well as *severally*, the variance was held to be fatal. The annuity act *(b)* does not require this particularity. [*Knox*, contrà, said he did not mean to insist on this objection; to which the Court assented.] Then, 2dly, It was not necessary to state in the memorial that the obligor bound his *heirs* as well as himself. It certainly was not necessary to state that he bound his *executors and administrators;* because having bound himself, the law would of course bind them. And though *heirs* would not be bound unless named; yet the annuity act does not require that they should be named. The first clause only requires that the memorial shall contain the date of the bond, &c. and the name of all the *parties* &c.; which could not be meant to include *heirs*, as these must be uncertain at the time; but must be intended of the grantors and grantees, &c. [Lord *Ellenborough* C. J. The defendant's argument will be that this is an improper description of the instrument assuring the annuity.] The act sets forth the particular parts of the instrument, which it requires to be stated, in which *heirs* are not included, unless they fall under the description of *parties*. Many of the objections taken in *O'Callaghan* and *Ingilby (c)*, and *Morys* v. *Leake (d)*, were answered by the Court saying that the act did not require the several matters suggested to be inserted in the memorial, though certainly forming parts of the description of the instrument. And where objections of this sort have prevailed in other cases, they have been where trusts, omitted, qualified and altered those which were stated in the memorial.

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Knox, contrá. The object of the annuity act was to require the real transaction between the parties to be stated in substance in the memorial; which has not been done here. The not naming the *executors and administrators* of the obligor, though not a literal, is yet a substantial compliance with the act because the law binds them: but the *heir* not being bound, unless expressly named *(e);* and though in fact named, not being noticed in the memorial; the real transaction is not expressed:

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(a) 1 *East*, 398.
(b) 17 *Geo.* 3. *c.* 26.
(c) 9 *East*, 135.
(d) 8 *Term Rep.* 411.
(e) *Crossing* v. *Honor*, 1 *Vern.* 180.

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the true consideration does not appear in the memorial, because it states a security of less value than that which was bargained for. The heir, when named, quà *heir*, is a *party*, though the person may not be known at the time; but that is not necessary, because it is in his quality of *heir* only, that he can thereafter be liable. In *Hart* v. *Lovelace (a)*, it was held not enough to state that *all* the instruments were attested by A., B., C., &c. *or one of them;* without shewing the names of the respective witnesses to the respective instruments. And in *Willey* v. *Cawthorne (b)*, Lord *Kenyon*, in reasoning on the objection which there prevailed, namely, that the obligors were only stated to be *severally*, instead of *jointly* and *severally* bound, "the memorial does not truly describe the security *as to the extent of it;*" and the omission of the remedy here against the heirs is more important than the slip in that case.

Holroyd, in reply, was asked by Lord *Ellenborough* what he meant to argue would be a sufficient description of a bond; whether it would be sufficient to say that *a bond* of such a date was given by the party; whether it can be said to be a sufficient description of it, unless it be stated who are bound? To which he answered that the *obligor* is, properly speaking, the only person who is *bound:* the *heir*, though named, is only bound in respect of real assets by descent: it is the *property*, therefore, and not the *person* of the heir which is bound. But it is sufficient that the act does not require this to be stated: nor is there any reason for extending the words of it in this instance; because no information is conveyed, which would not be presumed without it.

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Lord ELLENBOROUGH C. J. If this were res integra, I should have great doubt whether full effect ought not to be given to Mr. *Holroyd's* argument, that it is sufficient to state in the memorial those things only which the act of parliament expressly requires: but we are now called upon to decide this case after a series of decisions have imposed a line of construction upon us, which, with security to other parties whose rights have been thereby affected, we cannot safely recede from. The act requires that a memorial of every *bond*, &c. should be inrolled; what then will satisfy those words? Unless they have some meaning, it would not be necessary to set forth the penalty of the bond, whether it created a charge of 100*l.* or of 1000*l.*; for the act does not proceed to make mention of the penalty amongst the enumerated circumstances expressly required to be stated. If then the memorial must contain a description of the several in-

(*a*) 6 *Term Rep.* 471. (*b*) 1 *East.* 400.

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struments assuring the annuity beyond the express letter of the act, as the cases upon it have in several instances decided, it seems also material to state who are bound by the bond, and whether the obligor has bound his *heirs*, who can only be bound if named: and if they be named in the bond and not in the memorial, how can the memorial be said to describe truly the *extent of the security?* which was considered to be necessary by Lord *Kenyon* in the case of *Willey* v. *Cawthorne*. And it is not sufficient to say that the effect of such a bond is to bind the *property* of the obligor in the hands of the heir, and not the *person* of the heir; for the heir himself is bound in respect of the property. Nor can I adopt the argument that it was unnecessary for the memorial to state this, because of the probability that the heirs should be bound; for if the extent of the security be required to be stated, it ought not to be left to conjecture, however probable. Founding myself, therefore, rather upon the authorities construing this act, than upon the more literal construction which I should have been inclined to put upon it in the first instance, I think this memorial is defective for want of stating that the *heirs* of the obligors were bound by their bond.

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LE BLANC J. *(a)*. The only question now made arises on the memorial stating that the obligors *became bound*, without stating that they bound their *heirs*, executors, &c. And this omission affects as well the bond of the principal as of the sureties. The other objection as to its being only stated that they *became bound*, generally, without stating that they were *jointly and severally bound*, has been properly given up, after the case of *Coare* v. *Giblett*. With respect to the principal objection, it is said to be only necessary to inrol a security or assurance for an annuity in those particulars which are expressly required by the act. But that is certainly too limited a construction; because it would not then be necessary, as it is not expressly required by the act to describe the extent of the security or assurance, whether for a greater or less amount; and yet that must have been intended. By the same rule it would be sufficient to state the bond, without stating the condition of it, if it had one; though the extent of the security would depend mainly upon that. And so there is a great difference, as to the extent of the security, whether or not the obligor bound his heirs. In the case of *Morys* v. *Leake* and *Jones*, which has been insisted on, *Leake*, the grantor of the annuity, had given the security of a rent-charge out of his benefice, and had also covenanted to pay the annuity; and *Jones*,

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(a) Grose J. was absent.

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the surety, had also given his personal covenant to pay the annuity on *Leake's* default; and the memorial had stated the covenant by *Jones*, but not the personal covenant of *Leake:* and Lord *Kenyon* held it sufficient to state *Leake* as the grantor of the annuity, without stating his covenant to pay it; because it was not necessary to state all the covenants in a deed, unless they modified the grant itself. That authority, therefore, will not help the argument. But the case which principally bears upon this is *Willey* v. *Cawthorne*, where a *joint and several* bond was stated in the memorial as a *several* bond only, which was held ill: and both Lord *Kenyon* and Mr. Justice *Lawrence* considered that the extent of the security and the nature of the remedy which the grantee would have to recover the annuity were material to be stated truly: and that as the security and the remedy were different in the case of a joint and of a several bond, the statement given of the extent of the security in the memorial was not correct. So here it makes a great difference whether the security be given in such a form as will bind the
[130] obligor, in respect of his real property, during his life only, or whether it would extend to bind his heirs after his decease to the whole extent of it: and it is not correct to state the security as binding him only and his personal representatives, when in truth it is more extensive.

BAYLEY J. having been before concerned as counsel in the cause, declined giving any opinion upon it.

Judgment for the Defendant.

Friday, July 1st.

The Mayor, &c. of CONGLETON *against* PATTISON and Another.

In a lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, &c. *and assigns*, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate: held that this covenant did not run with the land, or bind the assignee of the lessee.

THE plaintiffs declared in covenant upon an indenture, made the 23d *November* 1752, whereby they demised to *John Clayton* a piece of ground in *Congleton*, called the *Byflatt*, and a certain slip of land, through which a water-course was intended to be made, with liberty for making and repairing the same, and with liberty for *Clayton*, his executors, administrators, or assigns, to erect in the *Byflatt* a silk-mill, &c. habendum the said piece of ground and premises &c. to *Clayton*, his executors, administrators, and assigns, for 300 years from the date of the indenture;

yielding

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yielding and paying as therein mentioned. And *Clayton* covenated for himself, his executors, administrators, and assigns, with the corporation, that he, his executors, &c. would at all times during the term, before any persons should be received as servants, workmen, or apprentices, in such silk-mill, give notice of their names to the town-clerk of the borough, for the time being; and if he should immediately give satisfactory information to *Clayton*, his executors, &c. or to the then owner or occupier of the silk-mill, that any of the persons in such notice were legally settled in any other parish or township, and not in *Congleton*, then they should not be received to work in the business of such silk-mill, before a certificate of the settlement of such person under the stat. 8 & 9 *W.* 3. *c.* 30. should be given to *Congleton*. The declaration then stated the entry of *J. Clayton*, and the building of the silk-mill; and that on the 1st of *January* 1790 all the estate and interest, &c. of *J. Clayton* in the premises duly came to and vested in the defendants by assignment, by virtue of which they entered and were possessed, &c.: and then assigned as a breach, that after the defendants became so possessed, and while they were working the silk-mill, and during the continuance of the term, they received divers persons as servants, workmen, and apprentices to work in the said mill, without giving the previous notice before mentioned to the town-clerk of *Congleton*, and that the persons so received worked in the said mill without any such notice, and that they had not previously gained any settlement in *Congleton*: by reason of which the township of *Congleton* had become liable to relieve them and their families, and had expended a large sum in the same, and continued liable to the burden, &c.: and that the plaintiffs had also incurred great expence in the premises, and their estates and property in the township had been lessened in value.

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The defendants, after craving oyer of the indenture, by which it appeared further, that the term was granted by the corporation in consideration of 80*l.* paid, and of a nominal yearly rent; demurred generally to the declaration.

Littledale, in support of the demurrer, argued that this was not a covenant which run with the land, and therefore could not bind the defendants as assignees of the term. To make a covenant run with the land, it must appear that the performance or non-performance of it will affect the thing demised, but this is a collateral covenant not to introduce foreign poor into the township, and does not at all affect the working of the mill or the premises demised. Neither can it affect the corporation as the reversioner; for if any additional burden were brought upon the township

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township by such new-settled inhabitants, the lessee or occupiers must bear it. The covenant amounts to no more than an undertaking to indemnify the landlord from the expence of foreign poor; and is the same as if the lessee had covenanted to pay so much annually to the churchwardens and overseers for the use of the poor; which in *Mayho* v. *Buckhurst* (*a*) was held to be a collateral personal covenant. It does not appear but that at the end of the term the number of poor persons in *Congleton* may be diminished, notwithstanding a temporary increase for the present; or supposing the population there should then be greater, yet there may be a corresponding increase in the value of the lands, from the greater demand for the produce. Besides which, the question is blended with the general policy of the country, which may be affected by stipulations not to employ labourers out of other districts. *Spencer's* case (*b*) lays down the distinction between collateral covenants and such as run with the land; the latter must be such as effect the demised land itself, and not merely the collateral interest of the lessor; and this was recog-

[133] nised in *Bally* v. *Wells* (*c*); though there the covenant by a lessee of tithes, not to let any of the farmers of the parish have any part of the tithes, was held to run with the tithes and bind the assignee. In *Tatem* v. *Chaplin* (*d*) a covenant by the lessee, to reside constantly on the demised premises, was held to bind the assignee, though not named; but that affected the mode of occupying the land. And in *Brewster* v. *Kitchin* (*e*) Lord *Holt* held that a covenant by tenant in fee, who granted a rent-charge out of lands, to pay it without deduction, for himself and his heirs, would not bind his assignee. So *Co. Lit.* 215. *b.* commenting on the stat. 32 *H.* 8 *c.* 34. enabling grantees of reversions to re-enter on condition broken by non-payment of rent, doing waste, or other forfeiture, confines it to such conditions as are incident to the reversion, as rent, reparations, &c. and not for the payment of any sum in gross.

Richardson contrà. The quantum of interest cannot vary the question, if the covenant in any respect affect the land. Neither is it material to inquire whether the breach of the covenant will affect the lord's interest at the present period, if it may affect the land at the end of the term. [Lord *Ellenborough* C. J. Can we see with certainty that the increase of population in the township at the end of the term, supposing that to be the consequence

(*a*) *Cro. Jac.* 438. (*b*) 5 *Rep.* 16.
(*c*) 3 *Wils.* 25. *and Wilmot's Rep.* 341. (*d*) 2 *H. Blac.* 133.
(*e*) 1 *Ld. Ray.* 322.

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of the defendant's acts, will prejudice the land, or affect the value of the reversion? It might affect immediately other lands of the corporation in the township; but it could not affect the interest of the corporation in * these lands during the term.] There is no certainty of that effect being produced, but there is a reasonable probability of it; and the parties themselves have so considered it on the face of the deed. There is no certainty of prejudice to a landlord by breach of many husbandry covenants during the term; but if the parties stipulate for their performance upon the presumption that prejudice may ensue from the breach of them, that is sufficient to sustain the action. The case of *Bally* v. *Wells (a)*, cited, shews that the prejudice to the reversioner need not be certain, and that it need not arise during the term. [Lord *Ellenborough* C.J. There the covenant affected the very thing demised in the manner in which it was to be used: the breach of it had a proximate tendency to produce an effect permanently injurious to the landlord's estate. But it cannot immediately affect the thing demised, whether the mill is to be worked by persons of this or any other parish. Suppose the covenant had been only to employ freemen of the corporation in the mill, would that have run with the land as affecting the thing demised?] The covenant may be said to regulate the mode of enjoyment of the thing demised. By throwing a greater burden of poor upon the lessee or occupier in respect of the land, it may render him less able to pay his rent. But the injury to the reversioner during the term is not the principle on which these cases have proceeded. In *London*, and other great towns, it is a common restriction in leases that the occupiers shall not carry on their particular trades, which would certainly bind an assignee: and yet it cannot be said to be any immediate prejudice to the property during the term, or even afterwards in many instances: on the contrary, it might render the estate more valuable to the landlord in point of future rent.

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Littledale, in reply, with respect to convenants against exercising particular trades on the demised premises, they may run with the land, because they prescribe a particular mode of enjoying it; and if the appearance of the premises were any way altered for the purpose, it would be waste, as altering the evidence of identity of the thing demised. The same answer will apply to covenants regulating the course of husbandry. The term may end before the land is restored to its original or covenanted state, or the influence of the charge may continue after the appearance of

(a) 3 *Wils.* 25.

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it is done away. But the covenant here cannot affect the state, condition, or occupation of the land, even during the term; and it cannot be told whether, at the end of the term, there may be more poor or an increased rate, or, if increased, that there will not be a proportionable increase in the value of the land, from the very circumstances of an increased population.

Lord ELLENBOROUGH C. J. This is a covenant in which the assignee is specifically named; and though it were for a thing not in esse at the time, yet being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it. But this covenant does not affect the thing demised, in the one way or the other. It may indeed collaterally affect the lessors as to other lands they may have in possession in the same parish, by increasing the poor's rate upon them; but it
[136] cannot affect them even collaterally in respect of the demised premises during the term. How then can it affect the nature, quality, or value of the thing demised? Can it make any difference to the mills, whether they are worked by persons of one parish or another: or can it affect the value of the thing at the end of the term, independently of collateral circumstances? The settling an additional number of persons in this place may indeed, by means of the increased population, bring an increased burden at the end of the term on those who are to pay the rates: but that increase of population may also be an increased benefit of the land-owners, as it has happened within our own experience in many parts of this kingdom, the seats of manufactures, where the value of land has, in consequence, risen in a great proportion. But the covenant in question does not affect the thing demised immediately, but only, if at all, in respect of collateral circumstances; that is through the medium of an increased population, and the increased expence of providing for them on the one hand, with the increased value of the lands to be set against it on the other hand. How then does it affect the mode of occupation? The carrying on of a particular trade on the premises may be said to do that; but where the work to be done is at all events the same, whether it be done by workmen from one parish or another cannot affect the mode of occupation. The covenant therefore, not directly affecting the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named; and this is a question with the assignee, and not with the original lessee who entered into the covenant. In the case of *Bally* v. *Wells*, the covenant might
[137] affect the thing demised; for if the lessee of the tithe suffered any

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of the farmers of the parish to take their own tithes, such union of the land with the tithe might lay a foundation for claiming a modus, which might affect the future value of the tithes, and would immediately affect the occupation. But we cannot say that this covenant does either; and therefore it does not run with the land so as to bind the assignees.

LE BLANC J. (*a*). This covenant does not appear to me to run with the land, or bind the assignee. The question does not depend upon the length of the lease, or whether the injury to the lessor is to take effect in more or less time, but whether the thing covenanted to be done or not to be done immediately affects the land itself, or the mode of occupying it. But here it is only by collateral circumstances that this can make the land more or less valuable. It can no otherwise affect the land than as by introducing a greater number of persons into the parish who were not before settled there, and by enabling them to gain settlements, it may by possibility hereafter create a greater number of poor, who must be maintained by the occupiers, and so affect them; but this cannot be said to affect the land itself, or the mode of cultivating or occupying it. It is no more than if the lessee had covenanted that he would not employ such persons in any other house within the parish during his occupation of the premises in question. The work done is the same, whether by one set of servants or another; the nature of the property is not varied by it: but to employ persons in the mill who were not before settled inhabitants of *Congleton* may create a speculation whether it will affect the interests of the occupiers there. The ground, how- [138]
ever, on which I distinguish this case from others is, that this is not a covenant which affects the land itself or the mode of its occupation.

BAYLEY J. I agree that it is not material to consider how soon the act done, which was covenanted not to be done, may affect the land; but in order to bind the assignee the covenant must either affect the land itself during the term, such as those which regard the mode of occupation; or it must be such as per se, and not merely from collateral circumstances, affect the value of the land at the end of the term. Covenants to restrain the exercise of particular trades in houses fall within the first class: they affect the mode in which the property is to be enjoyed during the term. The case in *Wilson* may rank under the second class: for if the lessee or a stranger were in the actual occupation of the tithes during the term, the evidence o the lessor's right to

Grose J. was absent.

them

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them would be continued, and therefore the estate of the reversioner would be better at the end of the term. But here the state of the premises will be the same at the end of the term, whether the parish be more or less burdened with poor. I agree that the value of the reversion will not be so much if the poor's rate on the land be increased; but that burden would be increased by a collateral circumstance; and where the value of the reversion is only altered by collateral circumstances, the covenant will not bind the assignee of the land. As in the instance put of a covenant not to employ foreigners in any other mill in the parish: and yet the value of the reversion would be affected in the same manner in the one
[139] instance as in the other. Suppose a covenant by the lessee to make a communication by water from the demised premises through other persons' lands to another place, to facilitate the access to a market, the value of the reversion would be materially affected by the performance or non-performance of such a covenant; but it could not bind the assignee, because all the cases shew that the assignee is not bound unless the thing to be done is upon the land demised. Therefore, as this covenant does not affect the occupation of the land, nor alter the actual state of the property from what it would otherwise be at the end of the term, it does not bind the assignee.

Judgment for the Defendant.

Friday, July 1st.

Buckley *against* Kenyon.

In covenant on an indenture of demise of a coal mine, made on the 8th of *July* 1805, reserving 1-4th of the coal raised or the value in money at the election of the lessor; and if the 1-4th fell short of 400*l. per annum*, then reserving such additional rent as would make up that *annual* sum, to be rendered *monthly* in equal portions: held that the lessor having elected to take the whole in money may declare for two years *and three months'* rent in arrear. But even if the money-rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th or the value in money, &c. but had refused, &c. held that it would not hurt on *general* demurrer, that the court went on to allege that before the exhibiting of the plaintiff's bill, *viz. on the 1st of November*, 1797, 900*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject-matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill 900*l.* of the rent reserved, &c. was due, is sufficient.

THE plaintiff declared in covenant upon an indenture of demise, made on the 8th of *July* 1805, by *J. Buckley* (from whom he derived title) to the defendant and others; whereby he demised to them certain mines of coal, habendum for 21 years from the 25th of *December*, 1802, yielding and paying to *J. B.*

his

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his heirs and assigns, during the term, 1-4th of the coal raised, &c. or the value in money, at the election of the lessor, &c. But if the 1-4th, &c. fell short of the annual value of 400*l.* then yielding such additional rent as would make up that annual sum, to be rendered on *the first day of every month* in each year of the term demised by equal portions. Then followed a general covenant by the lessees for payment of the rent. The declaration then stated the death of *J. B.*; the descent of the reversion to the plaintiff; that he afterwards elected to be paid his rent in money, &c.; and that during the term, &c. to wit, on the 24th of *August* 1805, and on divers other days in each month between that day and the day of exhibiting the plaintiff's bill, the lessees raised 50,000 baskets of coal, the annual value of which did not amount to 400*l.* And then assigned as a breach that the lessees had not yielded and paid to the plaintiff on the 1st day of every month since the death of *J. B.* the 1-4th, &c. or the value, &c. or the difference between the amount, &c. and 400*l.* per annum, but had neglected and refused so to do; and that before the exhibiting of this bill, to wit, *on the 1st of November* 1797, 900*l.* of the rent reserved *for two years and three months*, at the rate of 400*l.* a year, was and still is due and in arrear from the lessees to the plaintiff. To this there was a general demurrer and joinder.

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Campbell, in support of the demurrer, contended that the breach laid was bad in substance, the plaintiff having declared for non-payment of rent alleged to be due on the 1st of *November*, 1797, which was before his own title accrued, and before the lease itself was granted; and the day on which the rent is due being material, though laid under a videlicet (*a*), cannot be rejected as surplusage, and therefore the repugnancy is fatal. The defendant might have pleaded that no rent was due on that day, or a judgment recovered for all rent due at that time, and the plaintiff could not reply that he went for rent due afterwards, as that would be a departure. 2dly, It appears that the 400*l.* rent to be made up is reserved *yearly*, and must be so in the nature of the thing, notwithstanding what is said of its being rendered on the 1st of every month by equal portions; for till the end of the year it could not be told whether the proportion of coals raised, or the value thereof to be rendered to the lessor, which might be done monthly, would fall short of or exceed the 400*l.* But if that be a yearly reservation, the plaintiff cannot assign as a breach the non-payment of 900*l.* for a period including a fraction of a year, namely, two years and three months; for no such sum could have been due as

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(*a*) *Harvey* v. *Reynold*, *Latch.* 200. and *Grimwood* v. *Barrit*, 6 *Term Rep.* 460.

claimed

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claimed by the plaintiff. In these cases there can be no apportionment pro ratâ of the entire sum covenanted to be paid; according to *Needler* v. *Guest* (*a*), and *Rea* v. *Burnis* (*b*). And no remittitur can be entered for the excess; for that can only be done where there is a miscalculation of the sum claimed, not where the demand itself is unwarranted by the covenant.

Richardson, contrà, was stopped by the Court.

Lord ELLENBOROUGH, C. J. As to the first objection, the breach is first well assigned in the negative, that the defendant has not yielded the 1-4th of the coal, &c. but had neglected and refused so to do. But then it goes on to state that on a certain day, which is a day before the date of the lease, 900*l.* of the rent was in arrear. That date, however, is quite repugnant and impossible, being before the commencement of the lease by which
[142] the rent was reserved; and therefore it may be rejected altogether as surplusage. And that may well be done; for if the allegation had only been that before the exhibiting of the bill two years and three months' rent was in arrear, that would have been sufficient, at least on general demurrer, without stating the very day when that rent became due. I admit that the objection would hold if it were necessary in this case that some certain day should be alleged when the rent was due; for here the day alleged being repugnant is the same as if none were alleged; but the day is not necessary to be alleged. Then, 2dly, it is objected that the claim of 900*l.* is for rent for two years and three months, when the rent is reserved yearly. That, however, must depend on the construction of the covenant, which, though it speaks of an annual sum of 400*l.* to be made up in case the proportion of coal reserved should fall short of that sum; yet the rent is to be rendered monthly. Taking it, however, to be a yearly rent, the access for the three months may be remitted, and judgment given for the residue.

LE BLANC, J. (*c*). The allegation is that on the 1st of *November*, 1797, 900*l.* of the rent reserved for two years and three months, at the rate of 400*l.* a-year, was due, which day being before the lease, and therefore an impossible day for the rent to have been due, it must be rejected on general demurrer. Then even if the rent be reserved annually and not monthly as it is covenanted to be rendered, still the plaintiff's claim would be sustainable to the extent of 800*l.* and the rest may be remitted.

[143] BAYLEY, J. The day alleged is clearly an impossible day, and therefore must be rejected. And though the rent were pay-

(*a*) *Alleyn*, 9. (*b*) 2 *Lev.* 124. (*c*) *Grose*, J. was absent.

able

able yearly, the plaintiff would still be entitled to enter his judgment for 800*l.*, remitting the other 100*l.*, for which the case of *Incledon* v. *Crips* (*a*) is an authority in point. But here the plaintiff had his election to take his rent either in coals or in money, and the value in money was at all events to be made up 400*l.* a-year, and to be rendered monthly. If the plaintiff had taken his proportion of coals, monthly, it would not have been ascertained till the end of the year whether he was to receive any thing or how much in money: but having made his election to receive his whole rent in money, and that being at all events to be made up 400*l.* a-year, and the rent being made payable monthly, I think that his claim is good to the extent of the 900*l.* claimed.

Judgment for the Plaintiff.

(*a*) 2 *Ld. Ray.* 814. and *Salk.* 658.

REID *against* DARBY.

Monday, July 4th.

TROVER for the ship *Glamorgan*. At the trial at *Guildhall* a special case was reserved, stating that the plaintiff, being the sole owner of the *Glamorgan*, belonging to the port of *London*, and duly registered thereon* the 8th of *December* 1803, sent her in the spring of 1805 on a voyage from *London* to *Antigua* and back again, under the command of Capt. *Shelly*. The ship delivered her outward cargo at *Antigua*, and took in her homeward cargo, and arrived at *Tortola* to join convoy for *England*, on the 16th of *November* 1805. On her arrival at *Tortola*, being leaky, the master applied to the Vice-Admiralty Court there for a survey, when certain proceedings were had, which were stated at length in the case. 1. The petition for a survey, dated 18th of *November* 1805, and exhibited by a proctor on behalf of the

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The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey to be sea-worthy, or repairable so as to carry the cargo to its place of destination but at an expence exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to *sell* the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised bona fide in a case of necessity, still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the register acts: and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee.

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master, and intituled, "*Tortola*—Instance Court—The ship "*Glamorgan*—*J. Shelly*, Master—In the matter of the survey of "the ship *Glamorgan*, *J. Shelly*, Master, put into this port in "distress." In this the leaky and dangerous condition of the ship before her arrival at *Tortola* was stated (and verified on the oath of the master): "and that the master was desirous of having "a regular survey held on the said ship; Wherefore the said "proctor prayed, and the Judge at his petition decreed, the "usual writ of survey to issue, directed to" certain persons by name, merchants and ship-masters. 2. The commission or writ of survey, of the same date, issued thereon to the persons named, authorizing them to view the state and condition of the ship, and to report thereon to the Court, *and particularly whether the ship were sea-worthy or not;* and *if she could be properly repaired in* Tortola, *so as to render her sea-worthy:* and this return was to be made on oath. 3. Several reports, returned on oath by the different persons authorized, which in substance declared the ship to be totally unfit, in her then state, to proceed with her cargo, and that the expence of repairing her at *Tortola* would be more [145] than her value when repaired. These returns were dated 20th of *November* and 2d and 5th of *December* 1805. 4. The decree of the Court, dated 5th of *December* 1805. "The Judge, having "heard the said proofs read, pronounced that it appeared to "him that the said ship is totally unfit to proceed with her "cargo to *London*, her port of destination, and that the repairs "of the said ship in this port *(Tortola)* would amount to more "than her value when such repairs should have been completed." 5. The act to lead commission of sale, dated 16th of *December* 1805, which, after noticing the returns made as above, stated, "that for the benefit of those concerned the master was desirous of selling the said ship and her cargo in this port *(Tortola)*, and that he wished to obtain a commission directed to the marshal of the V. A. Court for that purpose: Wherefore the Judge, at his petition, decreed a commission, &c. to sell and dispose of the said ship and cargo for the benefit of those concerned." Then followed, 6. The commission of sale, dated 16th of *December* 1805, stating the previous proceedings, and "that for the benefit of those concerned the master was desirous of selling the said ship and cargo," &c. and to obtain a commission for that purpose: wherefore the Judge decreed a commission, &c. and authorized and commanded the marshal to expose to sale and sell the ship and cargo to the best bidder, and to "pay the produce-"money arising from such sale to the said *J. Shelly*, on behalf of

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"of the persons entitled thereto, first deducting thereout the ex-
"pences of the said survey and sale;" and to transmit an account of the sale to the Judge. The case then stated that under this sentence the ship was sold by the marshal of that Court to the defendant for 885*l.* currency, which was received by *Shelly*, the master, pursuant to the order, who has paid no part of it to the [146] plaintiff, claiming to have an account against him; and possession of the ship was delivered by the marshal to the defendant. The defendant, on the 25th of *January* 1806, procured the ship to be registered de novo at *Tortola*, and obtained a certificate thereof; in which it was stated that he was the sole owner of the ship *Glamorgan*, of *Tortola*, and that the ship was built at *Neath*, in the port of *Swansey*, in 1789, as appeared by certificate of registry, No. 433, of the 8th *December* 1803, which was "delivered up and cancelled, on account of the said vessel having put into this port *(Tortola)* in distress, and having been condemned as unfit to proceed on her voyage, and been sold for the benefit of the under-writers or others concerned." Stating further the built of the ship, &c. The defendant, after obtaining such certificate at *Tortola*, sent the ship to *Nevis*, where she arrived on the 2d of *February* 1806, and where he procured her to be again registered de novo, and obtained another certificate, dated 13th of *February* 1806, in which it was stated that he was the sole owner of the ship *Glamorgan, of Nevis*, and that the said ship was built at *Neath*, in the port of *Swansey*, in 1789, as appeared by certificate of registry, granted at *Tortola* the 25th of *January* last, and now given up and cancelled on account of the aforesaid owner becoming a resident of this said island. The defendant afterwards sent the ship from *Nevis* to *Grenada*, and from thence with a cargo of sugar and rum to *London*, where she arrived in July 1806, and delivered it in good condition. On the 4th of *August* 1806 the plaintiff demanded the ship of the defendant, which he refused to deliver up. The collectors of the customs at *Tortola* and *Nevis* transmitted copies of their [147] respective certificates to the collector at the port of *London*, who caused the following memorandum to be made in the book of registry at *London*. "Condemned at *Tortola* and registered de novo, 25th *January* 1806." The original *London* certificate of registry has not been transmitted. No bill of sale, reciting any certificate of registry of the ship, has been made to the defendant; nor has any copy of any such bill been delivered to the person authorized to make registry and grant certificates of registry at the port of *London;* nor any indorsement of or relating to the

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transfer of property in the ship to the defendant been made on any certificate of registry of the ship; nor any copy of any such indorsement been delivered to the person authorized to make registry, &c. at the port of *London;* nor any entry been indorsed on the oath or affidavit upon which the original certificate of registry was obtained; nor any memorandum made in the book of registry at the port of *London;* nor any notice given to the commissioners of the customs in *England*, otherwise than before mentioned. The question for the Court was, Whether the plaintiff were entitled to recover the value of the ship, and any and what special damage? If the plaintiff were entitled to recover, a verdict was to be entered for him, and the damages were to be ascertained by an arbitrator. If the plaintiff were not entitled to recover, a nonsuit was to be entered. This case was argued in *Hilary* term last by

Richardson for the plaintiff, who contended that the master had no general authority, as such, to sell the ship, and could derive none from a voluntary proceeding, instituted by himself for that purpose in the Vice-Admiralty Court: but that if he had in himself, or could derive from that Court, any such power,

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the property could only be transferred according to the forms of the registry acts. 1st, The master is considered as the agent for his owners for many purposes: he may hire mariners, procure necessaries for the ship and crew, and in case of necessity may hypothecate the ship in a foreign port; but he cannot sell the ship itself. His authority is to use and employ the ship; but it is contrary to the nature of such an authority to sell what he is to employ. It was so held in *Tremenhere* v. *Tresillian (a)*, which was a case of strong necessity for the sale by the master abroad, if any thing could justify it; but *Hale* C. B. was of opinion that the master, without the owners, could not sell the ship. The same general doctrine as laid down by Lord *Ellenborough* in *Hayman* v. *Molton and Others (b);* though he was inclined to admit that in cases of extreme necessity *(c)*, where a ship abroad had received irremediable injury, the captain might

(a) 1 *Sid.* 453. and 3 *Keb.* 91. S. C., which cites *Bridgman*'s case, *Hob.* 11.

(b) 5 *Esp. N. P. Cas.* 65.

(c) In *Jenkins' Rep.* 165., which was mentioned by Lord *Ellenborough* upon this occasion, the reporter says,—" Observ. Nota that the master of a ship, in case of danger and extremity, may cast the goods into the sea, and in some cases sell the ship, although it does not belong to him, as in case of famine," &c.

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have such a power. There, however, the jury found for the owner on the ground of a fraudulent sale. At any rate, however, this was not a case of necessity, in the true sense of the word, a necessity which supersedes all discretion; it was rather a case of *supposed expediency;* in which, as it turned out, the master was mistaken; for the ship was actually repaired, and proceeded on a voyage out and home. The true line is, that while the subject-matter, which he is entrusted to navigate, continues as a *ship*, and capable of navigation, with such repair as is to be had, he cannot sell it; he can only sell the materials when it is broken up [149] or become a mere wreck. 2dly, Supposing the master had the power of sale under these circumstances, he can only transfer the property by observing the requisites of the register acts *(a)*, all of which may be complied with, as well in the case of a sale by the master, as by the owner. The master can only sell, if at all, as agent of the owner, and an agent must always convey in the same form as his principal must have done. The 15th section of the stat. 34 *Geo.* 3. *c.* 68. does indeed expressly recognize the sale of ships by agents. And this is not contradicted by *Bloxam* v. *Hubbard (b)*, where a transfer of property by operation of law, such as from commissions of bankrupt to the assignees, was held not to be within the acts. 3dly, The Vice-Admiralty Court could give no more authority to the master to sell the ship than he had before. That Court proceeds in rem, to give effect to *claims* by adverse parties against the body of the ship; as upon hypothecation and bottomry bonds; in suits where the promovent claims property in the ship; in suits for mariners' wages; in certain cases of torts, as where there has been a collision between two ships, one of which has been injured, and compensation is sought out of the other; and in cases of salvage, &c.: but there is no trace in the books on this subject of a suit *upon a survey of the ship* to see whether or not she be sea-worthy. Neither do the commissions to the V. A. Courts contain any such power, though they have large and general words as to suits: but all suits in [150] those courts are between different parties, and there is no instance of an ex parte proceeding. And he referred to *Clarke's Praxis Curiæ Admiralitatis*, which states the modes of proceeding, divided into proceedings *in personam & in rem;* particularly tit. 1 and 28.; Dr. *Brown's Treatise on the Civil and Admiralty Laws*, ch. 9. p. 396. &c.

(*a*) The cases referred to were *Moss* v. *Charnock*, 2 *East*, 399. *Heath* v. *Hubbard*, 4 *East*, 110. *Bloxam* v. *Hubbard*, 5 *East*, 407. and *Hayter* v. *Jackson*, 8 *East*, 511.

(*b*) 5 *East*, 407.

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Scarlett, contrà. The question is whether when a master of a ship on a distant voyage, exercising an honest judgment, believes his ship to be absolutely incapable of completing her voyage, he may make a sale of her on account of his owners, so as to bind them? If such a power exist at all, it cannot in the nature of it be confined to such cases of necessity in fact as supersede all discretion. Every question of necessity is a mixed question of fact and of judgment: the subsequent events cannot make any difference: but the consideration must be the same as if the purchaser had been obliged to break up the ship immediately. In this case the jury have concluded the question of necessity by their verdict. As a general rule, it may be admitted that the master cannot sell *(a)*, though he may hopothecate the ship for repairs and necessaries furnished abroad: but that rule only applies so far as to negative any implied authority from the owner to the master to put an end to the adventure by the sale of the ship: but where the adventure is absolutely put an end to by the perils of the sea or the like, there is no rule of law to prohibit the master from acting according to the best of his judgment for the benefit of his owner by selling the ship. In the case of *The Betty Cathcart (b)*, which was that of a *British* ship, sailing
[151] without a register from circumstances of necessity; Sir *Wm. Scott* said that the revenue and navigation laws were to be construed and applied with great exactness; but that cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or had acted at least for the best, must be considered in that system of laws just as in other systems; and that laws that would not admit of an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies. And there he decreed the vessel not to be forfeited. So in the case of the *Gratitudine (c)* it was admitted that, generally speaking, the master had no authority over the cargo for the purposes of sale, but only for safe custody and conveyance; and yet, said the same learned Judge, in cases of instant, unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him, not by the appointment of the owner, but by the general policy of the law, to protect the property. And he instanced the throwing overboard part of the cargo at sea, in imminent danger, to preserve the remainder; and the case of ransom. That there were other

(*a*) *Johnson* v. *Shippen*, 2 *Ld. Ray.* 984. (*b*) 1 *Rob. Adm. Rep.* 221.
(*c*) 6 *Rob. A. R.* 240. 257. 259, 260.

cases

cases where the master had the same authority forced upon him in port; as if the ship were driven into port with a perishable cargo, and unable, or wanting repairs to enable her, to proceed in time. In that case, said he, he must exercise his judgment, whether to transship or sell the cargo; and even though he had the means of transshipping, he may act for the best in deciding to sell. But if he acted unwisely in that decision, still the foreign purchaser would be safe under his acts. And there it was held that he might in a case of distress hypothecate the cargo for repairs of the ship. Sir *Wm. Scott*, in the same case, adverted to the practice in question, of applying to the V. A. Courts in the *West Indies* for leave to empower the master to sell: and though he says it has been a matter of complaint that this power was sometimes abused, yet he admits its existence in cases of real necessity. "Necessity," he says, in another part *(a)* "creates law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal." In the case of a ship cast on shore, if any thing escaped alive, the property saved was not to be considered as wreck, but by stat. of *Westm.* 1. *c.* 4. was to be preserved by the sheriff, &c. a year and a day for the benefit of the owners. Yet, says Lord *Coke* (*b*), in his comment on it, if the goods be perishable, of necessity, (which is excepted out of the law) the sheriff may sell such goods within the year. It is the common practice of merchants, for the captain to make what salvage he can of the goods, as well as of the ship, in all cases of danger and distress; and this is recognized in the form of marine policies. [*Lawrence* J. It was held in *Milles* v. *Fletcher (c)*, that where the ship was captured and recaptured, but the voyage was lost, and the captain acting for the best had sold the ship and cargo, the owner might recover against the underwriters for a total loss.] What is the master to do in such cases, if he have no power to sell? he must either suffer the vessel to perish, or it must be preserved at an expence greater than its value. 2dly, If the master have such a power, this is not a case within the register acts. *All* the requisites of those acts could not have been complied with; which shews that none of them were meant to apply to the case of a sale under a power given by law, and not by the act of the party; and that was the distinction on which *Bloxam* v. *Hubbard* (*d*) was decided. The 16th section of the stat. 24 *Geo.* 3. c. 68., which comes nearest to the present case, namely, where the owner is at home,

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(*a*) 3 *Rob. A. R.* 266.
(*b*) 2 *Inst.* 168.
(*c*) *Dougl.* 230.
(*d*) 5 *East.* 407.

and

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and the ship is sold abroad, only applies, however, to the case of voluntary transfers of ships; and not to cases where the owner ceases to have any interest in the subject-matter as a ship, and only sells it as a *wreck*, or the materials of a ship. The registry acts certainly would not apply to the case of hypothecation, and by the same rule not to a sale by the like necessity. [*Lawrence* J. A ship may be worth repairing to a person on the spot, though not so to the owner in *England*. Lord *Ellenborough* C. J. It is not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo. *Le Blanc* J. While the subject-matter is in the form of a ship, though wanting repairs, which, perhaps, it might not be worth the owner's while to make, would not the provisions of the register acts continue to apply to it, if it were in a *British* port? Lord *Ellenborough*. Must we not consider under the register acts, whether the vessel were sold as a ship, capable of repair, or as a mere wreck?] 3dly, as to the jurisdiction of the V. A. Courts to order sales in such cases; it has been frequently exercised of late years, though there is no express adjudication upon the point. The words, however, of their commission are very
[154] large and general, extending to all suits, &c. to all cases of wreck and derelict. If, then, the captain could not sell, and did not think it was worth while to repair, he must abandon the ship; and then it is clear that the Admiralty Court would have jurisdiction. This consideration forms some check on the abuse of the power; for the master must submit in the first instance a case to that court, in which he would be obliged to abandon the ship, if he were not empowered to sell it. [Lord *Ellenborough*. How can this be considered as a derelict on the high seas, which was in port and under the captain's control all the time?] Sir *Wm. Scott*, in the case of the *Gratitudine*, seems to recognize the practice as exercised under the Admiralty jurisdiction. At any rate the defendant is entitled to be considered as the salvor of the ship in this case; the master having abandoned her, and the defendant having brought her home in safety; and therefore the plaintiff cannot maintain trover, without a tender of the salvage. [Lord *Ellenborough* C. J. If the sale by the master were a tortious act, the defendant cannot thereby acquire a lien on the ship.] No tort was meditated by the master, and there is no privity between him and the defendant, who purchased under the sale decreed by the V. Admiralty Court.

Richardson, in reply, maintained that the sale was not a matter of strict necessity, supposing that to be sufficient, as in the

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case of a wreck; but of necessity arising out of discretion and judgment. It was not made, because the captain thought that she could not be navigated after some repair, but that she could not be beneficially navigated. It was his judgment, and which must now be taken to have been his bonâ fide judgment, upon the *expediency* of a sale. But the thing was sold as a ship and not as [155] a wreck; and immediately after, she was registered de novo; which shews what the true nature of the transaction was, and brings the inquiry back to the original question, Whether the master could, by his own authority, or by aid of the V. A. Court, *sell* the ship, because he thought she could not be beneficially navigated any further: and if so, whether the property were legally transferred, without complying with the requisitions of the register acts? The power of sale in the captain is not proved by the clause in sea policies, empowering the captain, in case of misfortunes, to sue, labour, and travail, for the assured; for that is inserted in order to make the underwriters liable for expences incurred in so doing. And as to *Milles* v. *Fletcher*, the sale was ratified by the owners, and being bonâ fide, it was held to bind the underwriters. The register acts have been held to extend to *all* sales of *British* ships by one *British* subject to another; and must of course include every sale by an *agent*, under whatever circumstances. Commissioners of bankrupt are not *agents* of the bankrupt in any sense of the word; but the property, which is vested in them by operation of law, is transferred by statutable authority. Supposing the owner went with his ship, but was not *resident abroad*, so as to fall within the precise words of the clause referred to; still he could not convey without complying with the requisite forms prescribed: so then must his agent. The only difference between sales abroad and at home is that in the former case the party has, by *s.* 17., a longer time allowed to complete the registry: but the agent cannot have a greater authority than his principal. In considering the question with relation to the register acts, the Court cannot enter into any consi- [156] deration of the motives which induced the sale of the ship. And as to the defendant's lien for salvage, that can only exist where the salvor acts for the benefit of the owners, and not on his own account, as here. [*Le Blanc* J. If the sale be not lawful, the defendant has converted the property by using it for his own benefit: for he shipped the homeward bound cargo on his own account, and brought it home.]

Lord ELLENBOROUGH C.J. then stated with particularity the several points arising out of the case; and concluded with saying, that

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that as some of them were of great and general importance to the mercantile world, and to the interests of the country, the Court would take them into mature consideration. And in this term his Lordship delivered the opinion of the Bench.

After stating the case—The transfer of the property in the ship, upon which the defendant in this case relies, can only be supported on one of these two grounds, First, that of a valid sale under the decree and commission of the Vice-Admiralty Court of *Tortola*, where the sale took place; or, secondly, on the ground of an authority, either express or implied, derived from the owner to the captain, enabling him to sell the ship in such a case as has occurred. For the former, viz. that of a valid sale under the decree and commission of the Vice-Admiralty Court of *Tortola*; upon the fullest inquiry we have been able to make, we find no adequate foundation in the legitimate powers of the Admiralty Court. No instance has been discovered in which such a power
[157] has been exercised in the Admiralty Court, at home: nor can we find any terms in the Vice-Admiralty commission, or any principle upon which that practice can be sustained, (which certainly, however, has obtained in the Vice-Admiralty Courts abroad,) of decreeing, upon the mere petition of the captain, the sale of a ship reported upon survey to be unseaworthy, and not repairable, so as to carry the cargo to the place of its destination, but at an expence exceeding the value of the ship when repaired. And in respect to the latter ground; in addition to the other cases cited in the argument, it is expressly laid down by Lord *Holt*, in *Johnson* v. *Shippen*, 2 *Ld. Ray.* 984., that the master has no authority to sell any part of the ship, and that his sale transfers no property; but that he may hypothecate. But supposing that it could be fully made out in argument, that the captain was warranted by an adequate authority, express or implied, from his owner to sell the ship, in the case of a necessity like that which has occurred; still, inasmuch as the ship specifically subsists, and is capable of being used as such for purposes of navigation, and has in fact continued to be so used; we are of opinion that it must be regarded as an object of registration, under Lord *Liverpool*'s act, upon any transfer thereof between party and party: and that the forms required by the registry acts not having been in this case complied with, the transfer in question is on that account void. We feel ourselves, therefore, in a case where the sale is found to have been bonâ fide, and made, as it should seem, for the actual, as well as the intended benefit, at the time, of all concerned, reluctantly obliged

obliged to pronounce it invalid: and that the plaintiff, the original owner, still remains such for the purpose of this action, and that therefore he is entitled to recover in this action.

Postea to the Plaintiff.

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ROE, on the Demise of PRIDEAUX BRUNE, Clerk, *against* EDMUND PRIDEAUX and Others.

Monday, July 4th.

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IN ejectment for lands in the Parishes of *Padstow*, *Little Petherick*, and *St. Issey*, in the county of *Cornwall*, the lessor of the plaintiff laid one demise on the 1st of *January* 1802, and another on the 1st of *January* 1806: and at the trial a special verdict was found, setting forth, in the first place, indentures of lease and release of the 1st and 2d of *January* 1718, whereby *Edmund Prideaux*, the elder, conveyed to trustees his manors of *Padstow* and *Hustyn*, in *Cornwall*, the advowson of *Padstow*, and his capital messuage, farm, and demesne lands called *Guardandria*, and other lands specified, to certain uses therein mentioned; reserving to himself a power of revocation (except only as to the life-estate of *Susannah* his wife), and to limit other uses. Then by lease and release of the 15th and 16th of *March* 1726, made after the death of his wife, *Edmund Prideaux*, the elder, conveyed other premises to the trustees, for the like uses, and with the like power of revocation. *Then, by indentures of the 18th and 19th of *October* 1728, *E. Prideaux*, the elder, revoked

An estate, the greater part of which was in lease, either for years certain not exceeding 21, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should "be entitled to "the freehold "of the pre- "mises or any "part thereof, "when he "should be in

" the actual possession of the same, or any part thereof, from time to time, by indenture to " make leases of all or any part or parts of the demesne lands, whereof he should be in the " actual possession as aforesaid, for any term or number of years not exceeding 21 years, or " for the life or lives of any 1, 2, or 3 person or persons: *so as* no greater estate than for 3 " lives be at any one time in being in any part of the premises; and so as the ancient yearly " rent, &c. be reserved." Held, 1st, that the power only authorized either a chattel lease not exceeding 21 years, or a freehold lease not exceeding 3 lives; and that a lease by tenant for life for 99 years determinable on lives, as it might exceed 21 years, was void at law, and was not even good pro tanto for the 21 years.

But, the special verdict finding that the tenant in tail had received the rent reserved by such lease accruing after the death of the tenant for life who made it, and who had not given any notice to quit: held, 2dly, that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; and for the defect of the special verdict in this respect a venire de novo was awarded. But the Court intimated that under the circumstances of the case, and the disparity of the rent reserved, being 4*l.* 2*s.*, while the rack-rent value was 60*l.* a-year; (though one of the lessees had been presented by the homage as tenant after the death of the tenant for life, and admitted by the lord's steward; and the 4*l.* 2*s.* reserved was more than the ancient rent;) a jury would be strongly advised to decide against a tenancy from year to year.

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voked the former uses, and in consideration of love and affection for his relation, *Edmund Prideaux*, the younger, and for settling and continuing the estates in the name, blood, and family of the *Prideauxes*, he limited the same to the trustees and their heirs, as to all the said manors and lands, &c. except *Guardandria*, to the use of himself for life; and as to *Guardandria*, to the use of *E. P.* the younger, for life; remainder to the use of himself for life; remainder, as to all the manors and lands, to the use of *E. P.* the younger, for life; remainder to *Humphrey*, the eldest son of *E. P.* the younger, for life; with remainder to his first and other sons in tail male in strict settlement; with like remainders to the second and other sons of *E. P.* the younger. Next followed a jointuring power to be exercised by *Humphrey* and the other sons of *E. P.* the younger, as they should respectively be seised of any of the said estates, except *Guardandria*. Then came the leasing power, on which the question turned. "Provided also that it shall and may be lawful for the said *E. P.* "the elder and *E. P.* the younger, and for *Humphrey Prideaux*, (and the other sons, naming them, of *E. P.* the younger) "and for all and every other person and persons, who by virtue of the limitations aforesaid shall be entitled to the freehold of the premises, or any part thereof, when and as he and "they shall be in the actual possession of the same, or any part "thereof, by virtue of the limitations hereinbefore contained, "or any of them, from time to time, by indenture made under "his or their hand and seal, hands and seals, to make grants, "leases, or demises, of or for all or any part or parts of the de-
[160] "mesne lands, whereof he or they shall be in the actual possession as aforesaid, for any term or number of years, not exceeding one-and-twenty years, or for the life or lives of any one, "two, or three person or persons; so as no greater estate than "for three lives be at any one time in being in any part of the "premises; and so as the ancient yearly rent, or a proportionable part thereof, be reserved." The special verdict then stated the deaths of *Edmund Prideaux*, the elder, on the 1st of *December* 1728, and of *Edmund Prideaux*, the younger, on the 10th of *June* 1745, and the seisin of *Humphrey* for life: That *Humphrey* had issue the lessor of the plaintiff, his eldest son, and also *Humphrey*, *Mary*, *Edmund*, *Neville Richard*, *Nicholas*, *William*, and *Thomas*, his other children. It then set out four several leases granted by *Humphrey Prideaux*, the tenant for life, and father of the lessor of the plaintiff, for the benefit of his younger children, under which the defendants, some of his younger

younger children, claimed; the validity of which leases under the power were now questioned. By the first of these, dated 13th of *January* 1792, *Humphrey*, the father, for the advancement of his son *Edmund*, demised to *T. Prater* certain of the lands in settlement, reserving timber, mines, and stone quarries, &c. for the term of 99 years, if *Edmund* and *Mary Prideaux*, his son and daughter, or either of them, should so long live; *the said term to commence from and immediately after the death of* Wm. Ball, or the surrender, forfeiture, or other sooner determination of *a former estate in the said premises then determinable on his death;* in trust for the use of *Humphrey*, the father, for life, and then for *Edmund*, his son; reserving an annual rent of 4*l.* 2*s.* clear of all rates, taxes, and reprizes, and 5*l.* in lieu of a heriot, upon the respective deaths of *Edmund* and *Mary Prideaux*, after the commencement of the term. The jurors then found that *E. Prideaux*, named in that lease, is yet living; that the rent thereby reserved is more than the ancient yearly rent *(a)* of the demised premises; and that at the time of granting the lease *Wm. Ball* was possessed of the same premises for the residue of a term of 99 years, determinable on the deaths of the said *Wm. Ball* and two others, which two others were then dead, under a former lease, dated 2d of *November* 1739, purporting, in the body of it, to be made between the first named *Edmund Prideaux*, the younger, Sir *John Molesworth* Bart. and *F. Gregor* Esq. of the one part, and *Christopher Ball* of the other part; but in fact executed by Sir *J. M.* and *F. G.* (there recited to be the attorneys of *E. P.* the younger,) in their own names only; without naming the said *E. Prideaux* in the execution. That *Wm. Ball*, the survivor of the lives therein named, died on the 25th of *April* 1803; and that the premises thereby demised are now worth 60*l.* a-year, allowing rough timber, to be let at rack-rent. The special verdict then set out three other similar leases from *Humphrey Prideaux*, two of them dated the 13th of *January*, and the other on the 18th of *June* 1792, for the advancement of others of his younger children; whereby he demised the residue of the premises for which this ejectment was brought, for 99 years, determinable on two lives; two of the terms to commence upon the death of one *Elizabeth Millett*, and the other on the death of one *Samuel Trebilcock*, or the surrender, forfeiture, or other sooner determination of a former estate in the same premises; which appeared to have been granted

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(a) The ancient rent was in fact only 1*l.* 19*s.* 6*d.*

in

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in a similar manner and form by *E. Prideaux*, the younger, the father of *Humphrey*.

The special verdict also set forth the particulars of those former leases, and it was urged in argument by the defendant's counsel that three at least of the four preceding leases were void on special grounds, at the time the leases of the 13th of *January* and 18th of *June* 1792 were granted by *Humphrey:* but as the Court afterwards, in giving judgment on the case, declared that their opinion was formed wholly independent of those questions, it is unnecessary to state those particulars, or the arguments founded upon them. It was also stated that *Elizabeth Millett*, on whose death the second and third leases were to commence, did not die till the 21st of *January* 1800; and that *S. Trebilcock*, on whose death the last lease was to commence, did not die till the 7th of *March* 1799. That the annual rent reserved under the second lease of the 13th of *January* 1792 was 12*s.* 6*d.* and a fat capon, &c. which was the *ancient* rent; but that the premises were now worth, at rack-rent, 35*l.* a-year. That the ancient annual rent of 13*s.* 4*d.* and a fat capon, &c. was reserved under the third lease; but the present rack-rent value was 17*l.* 10*s.* a-year. That 2*l.* 14*s.* 8*d.* clear of taxes, &c. reserved yearly under the fourth lease, was the ancient yearly rent of the premises; the improved rent of which is now 34*l.* a-year.

The special verdict then found that on the death of *Trebilcock* in 1799, *Thomas Ball*, one of the defendants, who had before married *Mary Prideaux*, named in the lease of 1792, entered and was possessed of the term thereby granted: and, on the 18th of *January* 1800, was presented by the homage as tenant at the
[163] manor court of *Padstow*, and paid a fee on his admission. That prior to and at the execution of the deed of settlement of the 19th of *October* 1728, the greater part of the lands belonging to the manors of *Padstow* and *Hustyn*, and amongst others the premises in question, were out on leases, either for years certain, not exceeding 21, or for longer terms of years determinable on life or lives, and a very small proportion was in the occupation of *E. Prideaux*, the elder, (the settlor;) and that all the lives named in such leases, granted prior to that settlement, were extinct before the granting of the said leases of the same premises in 1792: and that all the leases, the indentures of which are now extant, (of which there are many,) which have been granted by any of the tenants of the freehold in possession since the deed of settlement, have either been for a term of years certain, not exceeding 21 years, or for a longer term of years determinable on life

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life or lives; and that there are no leases extant, granted by any such tenants, for the life or lives absolute of any persons whomsoever. That *Humphrey Prideaux*, the father, died on the 1st of *May* 1795, on whose death the lessor of the plaintiff became seised of the premises comprised in the deed of settlement of 1728, and afterwards received the several rents of 4*l.* 2*s.*, 12*s.* 6*d.*, 13*s.* 4*d.*, and 2*l.* 4*s.* 8*d.*, reserved by the said four leases of 1792, up to *Michaelmas* 1805, from the several tenants. That the lessor has not given to the several lessees, or to the occupiers under them, half a year's notice to quit the several premises; but that before the 1st of *January* 1806 he did give notice to the parties claiming under each of the same leases, that he contended them to be void as against him. Upon these facts the jury referred the whole matter to the Court: and the case was argued in last *Easter Term.*

Dampier, for the plaintiff, before he argued the principal point, as to the due execution of the power, took up the preliminary objection which would be made as to the want of notice to quit. The value of the premises to be let at rack-rent is so disproportionate to the rents reserved, that these must be considered to be mere conventionary rents; and therefore the receipt of these rents by the lessor of the plaintiff cannot entitle the defendants to the half year's notice to quit, as tenants from year to year, supposing the leases to be void. This was decided in *Right* v. *Bawden (a)*, which varies from the present case only in one respect, that there the tenement was copyhold; and if the receipt of the conventionary rent had created a tenancy from year to year, it would have destroyed the copyhold tenure. The judgment of the Court, however, did not proceed upon that ground, though it was urged in argument at the bar; but went on the general ground, that the conventionary rent was paid on another account and for a different consideration. This is not a payment for rent on an implied holding, but on an express holding, which fails: how then can the terms of that express holding be referred to an implied holding, when from the difference between the rent and the value, it is highly improbable that such a contract could in fact exist. To entitle a party to notice to quit, he should hold by a title determinable by such notice. The case of *Wright* v. *Bawden* has been acted upon in subsequent cases at nisi prius, and no application has been made for a new trial. In the case of *Mildmay on the demise of Lord Digby* v.

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(a) 3 *East*, 260.

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Shirley, Dorchester, Sum. Ass. 1806, where the lessor of the plaintiff claimed 30 acres of leasehold on a lease determinable on lives long *before extinct, on which a rent of 13*s.* 4*d.* was reserved: it appeared that after the lives had run out, the steward, not knowing that, had continued regularly to receive the 13*s.* 4*d.* on the days on which it was reserved by the lease: wherefore it was objected that this payment of rent created a tenancy from year to year, and that there ought to have been a notice to quit. But *Thomson B.* held that it was not necessary; that no contract as of a tenancy from year to year could be presumed; that the payment was made *alio intuitu;* and that the case fell within the principle of *Right* v. *Bawden.* The principle upon which a tenancy from year to year is presumed, on the receipt of rent, is, that the rent is a compensation for the land; which in this case it is not: but the true consideration is either a fine or natural love and affection.

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If this objection be out of the way, the principal question arises on the validity of the four leases of 1792 granted by *Humphrey Prideaux* the tenant for life under the power: the first objection to which is, that they are all reversionary leases, granted to commence, not in præsenti, but upon the expiration of a former term, then outstanding upon the respective premises demised, and therefore contrary to the words and spirit of the power, which only enabled the tenant for life, or "person entitled to the freehold of the premises or any part thereof, when and as he shall "be *in the actual possession* of the same or any part thereof," to lease "all or any part or parts of the demesne lands *whereof* he shall be *in the actual possession* as aforesaid," &c. It is not enough that the lessor should be in the actual seisin of the freehold; he must also be in the actual possession of the lands demised, which he cannot be while there is a term outstanding in a prior lessee. A power to grant leases generally will not warrant the grant of a lease in reversion, even in this sense, where it is to commence on the determination of a present outstanding interest; according to the doctrine in *Winter* v. *Loveday (a)*, *Slocomb* v. *Hawkins (b)*, and *Goodtitle* v. *Funucan (c)*; in which latter, though the leases were held good, it was because they had an immediate commencement, and were concurrent with the prior subsisting leases: but the reasons there given shew that the leases here cannot be deemed to be concurrent. But if that be otherwise, the second and principal objection is, that *at law* a lease for

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(a) *Com. Rep.* 39. (b) *Yelv.* 222. (c) *Dougl.* 565.

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99 years determinable on lives, is not an execution of a power to lease "for any term or number of years not exceeding 21 years, "or *for* the life or lives of any one, two, or three persons." The introduction of the word *for* in the place where it is, shews that the words "*not exceeding*" do not apply, and are not continued on, to the words life or lives, &c. so as to connect the term or number of years with those words: the power to lease is not for any term or number of years, *not exceeding* 21 years, *or* the life or lives, &c., but *or for* the life, &c. The repetition therefore of the word *for* disjoins and separates the sentence, making two distinct clauses; as was held in *Winter* v. *Loveday*. Nor does the restriction "so as no greater estate than for 3 lives be at any "one time in being," &c. extend back to the term of 21 years, but is referred to life or lives; and means that there shall not be a lease for 21 years and a lease for lives at once on the estate; which might otherwise have been supposed to be authorized; all leases for years being less in the eye of the law than leases for lives. It appears then that there were only two sorts of leases [167] authorized by the power at the same time, and of the same premises; namely, a lease for years not exceeding 21 years, and a freehold estate not exceeding 3 lives: and the difference between freehold and chattel interests, as well in respect of the quality of the estates, as in the qualifications of different sorts which they confer, and also with respect to executions and forfeitures, is too notorious to insist upon. These leases, then, being neither of the one kind or the other, are not a good execution of the power at law; notwithstanding what fell from Lord *Mansfield* and *Wilmot* J. in *Zouch* v. *Woolston* (*a*), that whatever was an equitable, ought to be deemed a legal execution of a power; for both of them admit that that was not necessary to the decision of the case then in judgment; and they rather seem to hint what the law ought to be, than declare what it is. And Lord *Hardwicke*, in *Paget* v. *Gee* (*b*), in 1753, and Sir *T. Clarke*, in *Alexander* v. *Alexander* (*c*), in 1755, (the case of *Rattle* v. *Popham*, 2 *Stra.* 992, having been decided in 1735,) and Lord *Kenyon*, in *Doe* v. *Weller* (*d*) clearly recognize the distinction between a legal and equitable execution of a power: which was also recognized by what was done by Lord *Talbot* in *Rattle* v. *Popham*, after the decision at law. There are several authorities to shew that this is not a good execution at law of the power in question, be-

(*a*) 2 *Burr.* 1147.
(*b*) *Ambl.* 200.
(*c*) 2 *Ves.* 644.
(*d*) 7 *Term Rep.* 480.

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ginning with *Whitlock's* case (*a*), where the doctrine is laid down generally, that if one one hath power to make a lease for 3 lives, he cannot make a lease for 99 years determinable on 3 lives: and this, it is said, fuit concessum per totam curiam. And this case does not fall within the distinctions by which the lease there was

[168] supported: for, first, this is a restricted power to lease for 3 lives in the body of it; not a general power to lease, restrained only by a subsequent condition: secondly, there is no power here to lease in reversion. The general rule in that case is adopted in 2 *Rol. Abr.* 260. l. 38, &c., and in *Shep. Touch*, 269, 270; and in the same book, p. 277, it is said to have been "resolved that if "a tenant in tail make a lease for 99 years determinable on 3 "lives, it is not a good lease." The case of *Rattle* v. *Popham* (*b*) in this court is an express authority in point, where power being given in a marriage settlement to every tenant for life when in possession to limit the premises to his wife for her life by way of jointure, he made a lease for 99 years determinable on her death. And it was held that however she might be entitled to relief in equity, yet at law it was no execution of the power; the estates being very different; the one a freehold, the other a chattel. It is true that Lord *Talbot*, sitting in a court of equity, afterwards set up the lease, saying that it was not a defective but a blundering execution of the power, and made the defendant pay the costs. That was on the ground, as stated by the Master of the Rolls in *Alexander* v. *Alexander*, that less was given to the wife than what was allowed by the power: but there was no alternative in that case; no direction of the manner in which the tenant for life was to act, if he did not appoint to the extent of his power, but did less by granting a term of years. But here that line is chalked out: if the tenant for life go to the extent of his power, he may grant a freehold lease; if he do not, he must grant such a term as is limited by the power: other-

[169] wise, if the principle adopted by Lord *Talbot*, and recognized by Sir *T. Clarke*, in equity, be applied to this power, the words 21 years may be struck out, and a term of 99 years absolute granted, as all terms of years are in contemplation of law inferior to a freehold. A power like this, where the mode of granting terms as well as freeholds is pointed out, is exactly like the powers given by the legislature to tenants in tail (*c*), and ecclesiastical persons (*d*), and must have the same construction in a

(*a*) 8 *Rep.* 69. *b.* (*b*) 2 *Stra.* 992.
(*c*) 32 *H.* 8. *c.* 28. *s.* 2.
(*d*) Vide 13 *Eliz. c.* 10. *s.* 3. and 14 *Eliz. c.* 11. *s.* 1.

deed

deed as on the statute book: and in both these cases it is said to have been resolved (*a*), that a lease for 99 years determinable on lives is bad. This execution of the power is also bad upon the sense and reason of the thing, and the apparent intent of the parties in the deed. Two sort of leases were contemplated; freehold leases, and leases for years: the former indeed are more beneficial to the grantor at the time of the grant, a lease for 3 lives being worth much more for present sale than a lease for 21 years; but it has its inconveniencies as to the renewal: none can take place without the consent of the lessee, and the surrender of his lease: no concurrent or reversionary lease can be granted to any other person if the lessee will not renew: the remainder-man therefore has this chance on such leases. On the other hand, though a 21 years lease be worth less for present sale, yet there is a regular period of renewal; and if the tenant will not renew, a reversionary or concurrent lease may be granted to another person within the limited period. The tenant for life has his choice of these two methods of leasing; but he cannot give himself the advantages of both methods by leasing for 99 years determinable on 3 lives, which is not authorized by the [170] power; and gives him the advantage of renewing, upon the dropping in of a life, without the tenants' consent, which he could not do on a lease for lives: so that the remainder-man is sure of finding the estate full leased for 99 years determinable on 3 lives. In the case of *Rattle* v. *Popham* (*b*), the power extending only to a single life, there could be no prejudice to the remainder-man by reversionary or concurrent leases; which might be the reason for what Lord *Talbot* afterwards did in equity upon that case.

East, for the defendants. As to the preliminary objection of the want of notice to quit; the general rule is clear, that the receipt of rent is evidence of a tenancy, and in the absence of any express stipulation between the parties, the presumption of law is in favour of a tenancy from year to year; and it lays on the plaintiff's counsel to establish this to be an excepted case. But the reason and convenience of the thing, as well as the current of authorities, are in support of the objection. The defendants must either be trespassers or tenants, and the lessor of the plaintiff cannot maintain this ejectment, unless he can shew that they are trespassers; but the receipt of rent, quà rent, whether more or less, for the very period included in one of the demises laid,

(*a*) Vide *Shep. Touch.* 277. and 4 *Bac. Abr.* 69.
(*b*) 2 *Stra.* 992.

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is an express recognition of a tenancy of some sort; and nothing is shewn which determined it as to the other. One of the defendants was presented as tenant, and admitted by the lord's steward since the death of the last tenant for life. All the reasons which originally induced the rule of presumption in favour of a tenancy from year to year, instead of the old tenancy at will, and which require half a year's notice to quit, apply as well to this as to any other case. The tenant is induced by this recognition of his tenancy to expend his time, money, and labour in the cultivation of the estate. No safe distinction can be made upon the quantum of the rent paid with reference to the greatest rack-rent value. Where is the line to be drawn? If it were two thirds, or one half, or a quarter of the actual value, would that constitute a tenancy from year to year? but if it were an eighth or less, would that subject the party to be treated as a trespasser? The inconvenience and uncertainty which would ensue from attempting now to draw any such line, which is no where to be found in the books, would more than compensate any partial hardship which could arise from adhering to the general rule. The rents reserved and received in this case were not *customary* rents, as in the case of *Right* v. *Bawden* (*a*), which has been relied on; but they must be taken to have been the ancient rack-rents: the very stipulation in the power that they shall be reserved shews that. At the time of the settlement in 1728, the ancient rents were much less disproportionate to the then actual rack-rent value than they are now; but lapse of time will not alter the nature of the thing: and if these were then deemed to be substantial and tenant-like rents, though not the most which might even then have been obtained, when did they cease to be so, and become merely nominal, so as no longer to amount to a recognition of a tenancy? If the remainder-man in tail had come into possession within ten years after the settlement of 1728, when the rent reserved might have been a 6th or a 5th of the full value, and his receipt of rent from the then lessees would have constituted them tenants from year to year; at what other period would the necessity of giving notice to quit have ceased? The first lease reserved even more than the ancient rent, (in fact more than double,) which increases the difficulty of considering it as a mere nominal rent; though the proportion was as 4*l.* 2*s.* per annum, and 5*l.* in lieu of a heroit, to 60*l.*, the full improved rent. The term *conventionary* rents, which these are said to be, has no separate known

(*a*) 3 *East*, 260.

classification

classification in the law: all rents which are reserved by the convention or agreement of the parties express or implied are conventionary rents. But as contra-distinguished from common rack-rents by the mere disproportion of the value, the case of *Doe* v. *Watts.* (*a*), is an authority to shew that the receipt of such a rent will create a tenancy from year to year. That also was the case of a defective execution of a power of leasing, which required the *best rent* to be reserved. The best rent was 60*l.*, and the rent reserved was only 36*l.* a year. It seemed admitted that the remainder-man had accepted the rent in ignorance of the invalidity of the lease; which the court thought made no difference. A case was there cited of *Goodtitle d. Adeane,* v. *Prentice, Lent,* Surrey Assizes, 1790; where a lease of copyhold had been granted by the husband of the wife's land, without her consent, for 41 years, at a *small* rent; and after the death of both, the daughter, not knowing of the invalidity of the lease, had received the rent: notwithstanding which Mr. Justice *Gould* held that no notice to quit was necessary. Lord *Kenyon* however denied this case to be law; saying that perhaps it had passed without much consideration, and could not be put in the balance against all the other decisions: and all the court agreed that a notice to quit was necessary in the principal case. The case of *Right* v. *Bawden* (*b*), which followed, is very distinguishable from the present: 1st, That was a case between lord and copyholder, upon a demise *according to the custom* of the manor, which was binding on both, reserving the *customary* rent, &c., and not as between landlord and tenant in the ordinary sense of the words, upon a demise reserving an arbitrary rent, which is matter of particular stipulation between them. It was considered by the court there, that such a *conventionary,* or to speak more precisely, *customary* reservation, was not to be considered as a *rent* between *landlord* and *tenant;* and therefore that the receipt of it could not be evidence of a holding from year to year. 2dly; There was another reason urged there by the plaintiff's counsel against the holding under an implied tenancy from year to year; for that must have been by parol; whereas if the land were demised otherwise than by copy, it would have extinguished the tenure. 3dly, The lessors there considered the husband as *equitably* entitled for his life, and by consequence that they were *equitably* entitled to the customary 6*s.* rent and they had never received any quit rent from the widow,

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(*a*) 7 *Term Rep.* 83. (*b*) 3 *East,* 260.

who

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who claimed her free bench, after his death. 4thly, The lessors had never received the particular rent at all; they had only received a gross rent from their lessee of the parsonage, under whom the particular lands were held.

As to the principal point, the construction of the power; the situation of the parties, and of the property, at the time of the settlement, is to be regarded in aid of the construction. The property was mostly out upon leases for 21 years absolute, or for
[174] longer terms determinable on lives. The settlement of 1728 gave *E. Prideaux*, the elder, (the settlor) a life-estate in all but *Guardandria*, which was first given for life to *E. P.* the younger, with remainder for life to the elder *Prideaux*, and after his death the younger *Prideaux* was to take a life-estate in the whole; remainder to his sons in succession for life, with remainder to their respective issue in tail. There were, therefore, two estates of freehold in separate possession in the first instance, and the power of jointuring enabled others to be created afterwards: and this accounts for the wording of the power, which is framed with relation to the *possession* of the *freehold* of the premises, and not merely to the actual possession of the *land* itself. The power of leasing is given to the person "entitled to the *freehold* of the "premises, or any part *thereof*" (*i. e.* of the *freehold* of the premises) "when and as he shall be in the *actual possession* of the "*same*," (*i. e.* of the *freehold* of the premises) "or any part "*thereof*," (*i. e.* the freehold of any part of the premises.) The power itself is "*from time to time*, by indenture, to make grants, "leases, or demises (pluraliter) of or for *all* or *any part* or *parts* "of the demesne lands, whereof he shall be in the actual possession *as aforesaid*." These last words still refer to the same general antecedent, which is the *freehold*. The power is to be exercised *from time to time*, not only over *all* or *any parts* (of the *freehold*) of which the lessor shall be in the *actual possession as aforesaid*, but over any *part*; which looks to a repetition of the exercise of the power over the *same part*. It is to make leases (pluraliter, not lease or leases reddendo singula singulis) of any part from *time to time*; that is as each life dropped, or the years run out within 21. Then the power is to be exercised "for any
[175] "term or number of years, not exceeding 21 years, (*i. e.* absolute) or for the life or lives of any 1, 2, or 3 person or persons." These latter words may either be read as the plaintiff's counsel has read them; or they may be read "for any term or number of years [not exceeding 21 years, or] for the life or lives," &c. retaining and carrying down the first part of the description

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to the last: as if the settlor had said, I mean to give the tenant for life the option of granting leases for any term or number of years absolute, not exceeding 21, or *for any term or number of years, for the life or lives of* 1, 2, *or* 3 *persons.* And this way of construeing the sentence is the only one by which effect can be given to *all* the antecedent words. For there cannot be leases of any one part for different lives, made at different times, running together, as an estate of freehold cannot be made to commence in futuro; and yet the former words expressly give a power to make leases from *time to time* of any part; which may well be done consistently with all the words, if the power be understood to warrant leases for *terms of years for life or lives,* &c. And this meaning of the settlor is rendered more probable by looking to the state of the property at the time of the settlement, which was leased in the same manner; so that a power of leasing for *life* must have been suspended for a long period. But whatever doubt there might have been if the power had stopped here, it is put an end to by the subsequent words, which control and qualify what goes before, and shew the principal intent of the settlor to be "*So as* no *greater estate* than for 3 lives be at *any one time* "in being in any *part* of the premises." And this qualification cannot be confined, as it has been argued, to leases for lives; but over-rides the whole power of leasing. It could not mean *so as* [176] 4 or more lives should not be running on the same part at the same time, because the power was before expressly limited to 3 lives, and these latter words would be nugatory. Then it does not say *so as* no more than 3 lives be, &c., but so as *no greater estate, &c.* The substance of the qualification, therefore, is, that any *less* estate than for 3 lives might be granted, which was to depend upon the duration of life: in like manner, a lease for any number of *years certain* might be granted, not exceeding 21. And this is further evinced by the reference to "any *one* time in any part of the premises;" which falls in with the construction before put on the power to make leases from *time to time* of any part; which, with respect to leases determinable on life, could only apply to leases for long terms of years determinable on life or lives; which are *no greater,* but a *less, estate* than for 3 lives. This is also consonant to the construction which must be put on the other qualification of the power; "and *so as* the ancient rent, &c. be reserved;" upon which it is clear that the reservation of a *greater* rent would not avoid the lease: then why should the grant of a *less interest* than the power warrants be an avoidance? He then contended, that if the words were doubtful,

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doubtful, the contemporaneous and continued acts of the parties under the settlement, down to the death of the last tenant for life, was evidence to explain what they meant. Upon which the special verdict finds that at the time of the settlement, and since, as far as any evidence at all can be traced, the premises have always been leased, either for years absolute not exceeding 21, or for longer terms determinable on lives, and never for lives absolute. But as the court appeared to lean against the consideration and application of this evidence, and the point had been recently under discussion, he urged the argument no farther than by referring to the modern authorities on the subject; which are *Cook* v. *Booth* (*a*), *The King* v. *The Inhabitants of Laindon* (*b*), *Baynham* v. *Guy's Hospital* (*c*), *Moore* v. *Foley* (*d*), and *Iggulden* v. *May*, in Chancery (*e*), and at law (*f*).

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But admitting the true and only proper construction of the words, to extend the power of leasing to life estates, still the party in whose favor the power is created may take *less* than he is allowed out of the estate of the reversioner, who cannot complain of that; and by *Co. Lit.* 46. *a.* an estate for life is in the eye of the law, "a higher and greater estate than a lease for years, though it be for a thousand or more." The plain meaning of such a power is to enable the tenant for life to charge the remainder-man's estate to a certain extent: to whatever less extent the power is exercised, it is so much gained by the latter: and it was not impossible, though unusual, that one of the lives might have exceeded 99 years. Powers, says Lord *Mansfield*, in *Goodtitle* v. *Funucan* (*g*), are now a common modification of property in land, and as such are to be carried into effect according to the intention of those who create them. So said Lord *Kenyon* in *Pomeroy* v. *Partington* (*h*), though judges had sometimes erred in the application. A distinction also appears to have been taken (*i*) between powers reserved, as in this case, to the owner of the estate, or to one who would have been heir to it; which are always to be construed favourably for such persons; and powers given to a stranger, or to incumber a third person's estate; which are always construed strictly: but in no case can

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(*a*) *Cowp.* 819. (*b*) 8 *Term Rep.* 379. (*c*) 3 *Ves. jun.* 298.
(*d*) 6 *Ves. jun.* 238. (*e*) 9 *Ves. jun.* 329. (*f*) 7 *East*, 244.
(*g*) *Dougl.* 573. and vide *Right* v. *Thomas*, 3 *Burr.* 1446.
(*h*) 3 *Term Rep.* 675.
(*i*) Vide 16 *Vin. Abr.* tit. *Powers*, 470. *pl.* 19. cites *Sayle* v. *Freeland*, 2 *Ventr.* 350. *Fitzgerald* v. *Lord Fauconbirge*, *Fitzg.* 214. 219. *Fitzwilliam's case*, 6 *Rep.* 32. and vide *Coventry* v. *Coventry*, 9 *Mod.* 13.

it

it be permitted to a party to complain in a court of justice, that less has been taken from him than might have been. It is not pretended that a lease might not have been granted for less time than 21 years absolute (*a*), or for fewer than 3 lives, or for more than the ancient rent: then why not for less than one life, as for years determinable on a life which might survive the term. A lease for 21 years determinable on a contingency would be a lease for years not exceeding 21. So the lease might have been for one life determinable on a contingency, as upon the failure of another life, or any other event: yet that would not strictly be within the words of the power. But it is said to have been decided upon authorities that under a power to lease for lives, a lease for 99 years determinable on lives is bad. All the authorities concluding with that of *Rattle* v. *Popham* are resolvable into and depend upon *Whitlock's* case (*b*), to which they refer, where the position in question is a mere obiter dictum: for the power to lease there was general; with a proviso that the lease should not exceed the number of 3 lives at most; and under that a lease for 99 years determinable on two lives, *to commence* after the death or determination of a preceding estate held upon another life, was held a good execution of the power. It is true that the distinction was there taken, that the power to lease was "*in the beginning* absolute, affirmative, and indefinite;" and that the proviso afterwards came by way of qualification. But the intent [179] of the parties is to be taken from the whole of the deed taken together, and not from the position of its parts: and great stress is laid throughout that very case upon the intention of the parties. And Lord C. B. *Gilbert*, in his treatise on leases (*c*), after mentioning *Whitlock*'s case, adds, "It was said by the "judges in 3 Keb. (*d*), that the construction in *Whitlock*'s case, "that a person having power to make leases for 3 lives could not "make a lease for 99 years determinable on 3 lives, was too nice, "and expressly contrary to the intent of the parties." The case of *Rattle* v. *Popham* (*e*) is the only express decision upon the point of law; which does not appear by the different reports to have been much debated either at the bar or on the bench; but

(*a*) *Breers* v. *Boulton*, 3 *Keb.* 746. (*b*) 8 *Rep.* 69. *b.*

(*c*) 3 *Bac, Abr.* 151. tit. *Leases.*

(*d*) The margin of *Gwillim's* edition of *Bac. Abr.* refers to p. 746. where this expression is not to be found; but *Jones* and *Twisden*, judges, say generally on the statute of leases, avoiding leases otherwise than for 3 lives or 21 years, that a lease for *less* is good.

(*e*) 2 *Stra.* 992. and *Cun. Rep.* 102.

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to have proceeded upon the dictum in *Whitlock*'s case, which was the only authority cited at all bearing upon the particular question. The propriety of that decision, however, has been strongly shaken by what fell from Lord *Mansfield* in *Zouch* v. *Woolston* (*a*); who says that "Lord *Talbot*, arguing from "the same premises, the power, and the lease, without any "other circumstance, *held the lease to be warranted by the "power*," &c. And this is confirmed in substance by the Master of the Rolls, Sir *Thomas Clarke*, in *Alexander* v. *Alexander* (*b*). But it is contended that there is a distinction between a legal and an equitable execution of a power. It is difficult, however, to
[180] understand the grounds of such a distinction in construing the words of any instrument. Courts of equity, as well as of law, profess to construe all instruments according to the intention of the parties, to be collected from the words and subject-matter of the instruments themselves. How then can there be an acknowledged different rule of construction of the same words on different sides of the *Hall?* Lord *Mansfield*, in *Zouch* v. *Woolston*, adopting the argument of Mr. *Dunning*, expressly denies any distinction, and says that "*whatever is a good power or execution in equity, the statute* (of uses) *makes good at law.*" And *Wilmot* J. agrees with him. Lord *Mansfield* also distinguished powers of this sort from mere legal powers introduced by statute; such as leases by ecclesiastical persons or tenants in tail. Though it does not appear by any express decision that leases for 99 years determinable on 3 lives are not within the statutes regulating such leases. Lord C. B. *Gilbert* only says (*c*) that such leases "*seem* not good within the statutes:" and he thinks afterwards that they would be good within the stat. 32 *H.* 8. *c.* 28. upon the reasoning in *Whitlock*'s case: and he cites *Smith* v. *Trinder*, *Cro. Car.* 22., where a lease by husband and wife of the wife's lands for 60 years, *if she should so long live*, was considered sufficient to bind her within that statute. And in *Threadneedle* v. *Lyncham* (*d*) Lord *Hale* and the rest of the Court said they would not then dispute whether a bishop's lease on the stat. 1 *Eliz. c.* 19. for 99 years determinable on 3 lives were good or not. But at any rate this case is distinguishable from that of *Rattle* v. *Popham*, by reason of the latter words of the power, "*So as no greater estate*, &c. which ride over and qualify the
[181] grammatical strictness of the former words, and give the tenant for life full scope to grant any lease determinable on lives, less

(*a*) 2 *Burr.* 1147.
(*b*) 2 *Ves.* 644.
(*c*) 4 *Bac. Abr.* 69. rule 4.
(*d*) 3 *Keb.* 595.

than

than an estate for 3 lives. And such appears to have been the opinion of the Court in that case from Mr. *Ford's* MS. note of it; which in the main agrees with the report in *Strange;* but adds, *per Curiam,* "If the power had been general to provide for a "wife, *so as that he did not make a greater estate than for life;* "because an estate for years determinable on a life is a less "estate, such an estate might have been raised by virtue of the "latter power, which authorizes the creation of any estate "that is not greater than an estate for life," &c.

Supposing, however, the leases not to be good to the extent of them, at any rate they are good for 21 years determinable on the lives; for still they will be leases for 21 years; and the excess is apparent upon the face of them. In *Zouch* v. *Woolston (a)* Lord *Mansfield* said, considering powers brought into the common law by the statute of uses as a mode of ownership or property, "no doubt could ever have made whether a man "might not do *less* than his power: or if he did *more,* whether "it should not be good to the extent of his power." In *Alexander* v. *Alexander* (*b*) Sir *Thomas Clarke* puts the case, "suppose a power to lease for 21 years, and he leases for 40; that "shall be good for 21, because it is a complete execution of "the power, and it appears how much he has exceeded it. If "the Court can see the boundaries, it will be good for the execution of the power, and void as to the excess." So Lord *Kenyon,* when Master of the Rolls, in *Pitt* v. *Jackson (c),* considered that the excess only in the execution of a power was void. The same principle was also laid down by *Dyer* J. in *Philpott's* case (*d*), "where a man hath a warrant to do a thing, "and he doth it, and more, so as he exceeds his warrant; yet "it is good for that part which is warranted, and void for the "rest." Mr. *Parker* had power to raise 7000*l.* for younger children by deed or will; and by will he charged the premises with 8000*l.*: and decreed (*e*) to be good for the 7000*l.* In *Parry* v. *Bowen (f)* it was resolved by Lord Chancellor, that where a person hath power to lease for 10 years, and he leaseth for 20 years, the lease shall be good for 10 years in equity: and he said it had been so settled several times in that court. Courts of law are in the constant practice of applying the same principle to awards: if an arbitrator has exceeded his authority, and the measure of excess be apparent, the award is held good pro tanto.

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(*a*) 2 *Burr.* 1147. (*b*) 2 *Ves.* 644. (*c*) 2 *Bro. Chan. Cas.* 54.
(*d*) *M.* 15 *Eliz. in C. B.* 3 *Leon.* 29.
(*e*) *Parker* v. *Parker,* in 1714, *Gilb. Eq. Cas.* 168. and cited by the Court in *Coventry* v. *Coventry,* 1 *Stra.* 604. (*f*) 3 *Chan. Rep.* 11.

Then

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Then as to the objection of this being a reversionary lease; if the tenant for life could demise at all for more than 21 years determinable on lives, there can be no objection to such concurrent chattel leases for lives, not exceeding 3, which are all running out at the same time; though the one be not to commence in possession till the determination of the other. If there could be no objection to a demise for 99 years determinable on the lives of A. B. and C. to take severally in succession, in the same instrument; what difference can it make that they take by different instruments, or at different times? If the 3 lives be consuming at the same time, the reversion is not burthened beyond the terms of the proviso. The construction contended for would put the landlord in the power of the tenants, and compel him to purchase their surrender of the former estate, previous to every renewal, without any benefit to the reversioner. But even upon the disabling statutes, which have received so strict a construction, it has been long settled that concurrent leases are good; as in *Co. Lit.* 45. 4 *Bac. Abr.* 64, 5, 6, and the cases there cited. Concurrent leases under powers to lease in possession for years certain, or determinable on lives, have also been expressly held to be good, in *Winter* v. *Loveday* (*a*), *Read* v. *Nash* (*b*), *Fox* v. *Collier* (*c*), *Coventry* v. *Coventry* (*d*), *Goodtitle* v. *Funucan* (*e*), and *Doe* v. *Calvert* (*f*). And the legality of such leases was assumed by the legislature in the act for regulating the granting of the rolls' leases (*g*), which controls the exercise of the power to within 7 years of the expiration of the existing lease. In the first mentioned of these cases it was considered that where the lease depended on the duration of lives, they must from the very nature of the thing be concurrent and not reversionary. The lease established in *Whitlock's* case was a concurrent lease.

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Dampier was heard in reply at length, and observed as to the argument that the leases were good at least for 21 years, though void for the excess, that it was only a rule of equity, which had never been acted upon at law.

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The Court directed the case to stand over for consideration: and in this term

Lord ELLENBOROUGH C. J., after stating the substance of the special verdict, delivered the opinion of the court. This verdict furnishes two questions; the one, whether these four leases were

(*a*) *Carth.* 427 and 5 *Mod.* 381. (*b*) 1 *Leon.* 147. (*c*) 1 *And.* 65.
(*d*) *Com. Rep.* 313. (*e*) *Dougl.* 565—572. (*f*) 2 *East.* 376.
(*g*) Vide *Wilson* v. *Sir T. Sewell*, 4 *Burr.* 1976.

warranted

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warranted by the power; and the other, whether a notice to quit was in this case necessary. Two objections have been made to the leases; one, that they were to commence in futuro, and therefore such as the power did not warrant; the other, that the power did not authorize any lease for years which might by possibility exceed 21; and if we are of opinion that the latter is a valid objection, it is unnecessary to say any thing upon the former. The power authorizes the grant of either a chattel, or a freehold lease; the former not to exceed 21 years, nor the latter three lives: it is in the alternative to grant either the one, or the other, but not both; so that the same premises cannot at any one time be under leases both for years and lives. It was held in *Elmer's* case, 5 *Co.* 2. and *Marler* v. *Wright*, *Moor* 253, 4. that under the stat. 5 *Eliz.* c. 19. s. 5. which vacates all bishops' leases, except such as are for 21 years or 3 lives, the same premises cannot be under leases for years *and* lives at the same time: and it should seem equally objectionable under such a power as this. If this be so, it may make an essential difference to the reversioner or remainder-man, whether the premises are let for three lives, or for 99 years determinable upon three lives. A chattel lease may be granted pending a prior subsisting one, provided it be within the limits of the power, and provided it give no beneficial interest during the continuance of the subsisting lease; but so long as there is a freehold lease in esse, a second freehold lease cannot be granted. The right of granting a second chattel lease was settled in *Read* v. *Nash*, 1 *Leon.* 148, and is recognized as law in *Goodtitle* v. *Funucan*, *Dougl.* 3, *Ed.* 572: but a second freehold lease cannot be granted, because it must be to take effect in futuro, and a freehold cannot be conveyed unless it is to take effect in præsenti. 2 *Wils.* 166. If a lease therefore were granted for lives, no further lease could be granted till that lease were determined; not a chattel lease, because the power does not admit of the same premises being under a chattel and a freehold lease at the same time; nor a freehold lease, because that would be to commence in futuro: whereas, if there were a chattel lease for 99 years determinable upon three lives, and one of those lives were to drop, a second chattel lease for a new life, in addition to the other two, might be granted during the continuance of the first. Whenever a life therefore dropped, there would be this essential difference between a freehold and a chattel lease, that, upon the former, no new life could be added, unless the termor would surrender the first lease; whereas, upon the latter, a new life might be added without any such surrender. In the

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one case, therefore, an important advantage would accrue to the reversioner or remainder-man, if the tenant for life and the person intitled to the first lease could not agree upon a surrender; in the latter, such advantage would be wholly lost. Attending, therefore, to this material difference between the two descriptions of leases, can the court say that when the power uses terms applicable to one of them, the party is intitled at his option to grant the other? Can the court say that the person who created this
[186] power had not this difference in contemplation, and did not intend the reversioner or remainder-man should have the advantage which might result from confining the tenant for life to that species of lease which the power expressly mentions? in *Whitelock's* case, 8 *Co.* 69 *b.* this very point was conceded by the whole court; and if that case be law, the question here is at an end. In that case there was a *general* power to make leases, so as they did not exceed three lives or 21 years; and under that, a lease for 99 years determinable upon 3 lives was adjudged good; because the only restriction in the power was that the lease should not exceed 3 lives or 21 years; and a lease for 99 years determinable upon three lives is a lease not exceeding three lives. But a difference was taken between a *general* power, not specifying the kind of lease, but adding a restriction to limit the extent of the leases; and a power *particularizing the species of lease* to be granted: and it was said that "if one hath power to make a lease for three "lives, he cannot make one for 99 years determinable upon three "lives; quod fuit concessum per totam curiam." This position, though not the point decided, is adopted by Lord *Rolle* in his abridgment, vol. 2. p. 260. pl. 3. and by *Doddridge* J. in *Sheph. Touch.* 269. In *Rattle* v. *Popham*, 2 *Str.* 992. it was adjudged by Lord *Hardwicke* and the other judges of *B. R.* that a power to limit an estate to a wife for life did not, at law, authorize the granting her an estate for years determinable upon her death: and, according to the report of this case by the late Mr. *Ford*, the Court recognized the distinction laid down in *Whitelock's* case between such powers as particularize the species of leases to be granted, and such as do not. It is true that after the decision in *Rattle* v. *Popham in K. B.* Lord *Talbot* supported that lease
[187] in equity; and in 2 *Burr.* 1147. Lord *Mansfield* throws some discredit both upon *Whitelock's* case and *Rattle* v. *Popham:* but in *Shannon* v. *Breadstreet*, *Reports temp.* Lord *Redesdale* 66 to 71. Lord *Mansfield's* observations are canvassed by Lord *Redesdale*, and the determination in *Rattle* v. *Popham* is approved of by

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by him. And after full knowledge of what Lord *Talbot* had done after the decision in *Rattle* v. *Popham*, Sir *Thomas Clarke* when sitting for Lord *Hardwicke* appears to have considered that decision right. In 2 *Ves.* 664. he says "Suppose one has power "to jointure a wife for life, and appoint to her for 99 years if she "so long live; as in the case of Mr. *Newport;* at law it was "held in *B. R.* to be void, but in equity good pro tanto." It is therefore our opinion both upon principles and upon authorities, that as this power authorised leases for 21 years or three lives only, the leases in question, which are for 99 years determinable upon three lives, are not warranted by it. It was argued that the leases if not good for the 99 years, might still be good for 21 years should any of the lives so long continue; but it is sufficient to say that no authority was cited to shew that a court of law has ever held itself intitled to consider such a lease as good in part.

Upon the 2d question, Whether a notice to quit were in this case essential, we are afraid the special verdict does not enable us to decide the point. The receipt of rent is evidence to be left to a jury that a tenancy was subsisting during the period for which that rent was paid; and if no other tenancy appear, the presumption is that that tenancy was from year to year: and if there were a tenancy, it is not for the court to say, whether it be continuing or ended. In *Roe* v. *Ward*, 1 *H. Black.* 97, where tenant for life made a lease, and died, and the remainder-man received rent [188] from the lessee for two years; the payment on the one hand, and the receipt on the other, were considered as *evidence* of an agreement for a tenancy from year to year upon the terms contained in the lease. And in *Doe* v. *Watts*, 7 *Term Rep.* 83. where tenant for life made a lease not warranted by his power, and the remainder-man received the rent reserved by it, this court held this receipt evidence of a tenancy from year to year between the lessee and the remainder man; notwithstanding a case of *Goodtitle* v. *Prentice*, in which *Gould* Justice ruled the contrary: and the plaintiff having been nonsuited for want of a notice to quit, the nonsuit was confirmed. It has been argued that the great disproportion between the rents reserved, and the real value, will enable us to say that the receipt of the rents did not create a tenancy from year to year; and *Right* v. *Bawden*, 3 *East*, 260. has been cited to satisfy us it did not. In *Right* v. *Bawden*, however, there was no proof that the lord knew of the payment; for it was made to his lessee; and that was a special case, not a special verdict: and as it was obvious the jury must have been directed to draw a conclusion against a tenancy from year to year, the payment being made with

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with reference to a supposed tenancy of another kind, the Court might not think it necessary to send the case back to have that conclusion drawn. This is a special verdict, upon which if what the jury has found be evidence, and sufficiently material not to be rejected as surplusage, the court cannot draw the conclusion of fact which is to result therefrom, however palpable it may be what that conclusion ought to be. As to the disproportion between the rent and the value, the verdict does not enable us to [189] say what that disproportion was during the period for which the rent was received, because it only finds what was the value at the time of the verdict: but if the disproportion at the time for which the rent was received were ever so clearly ascertained, we could not act upon it, because it would only furnish ground to induce a jury to decide against a tenancy. The receipt of the rent is some evidence of a tenancy; upon that evidence it is peculiarly the province of the jury to decide; and though they would probably receive a very strong direction to decide against a tenancy, yet they only can decide it: and unless the defendants, therefore, will consent to strike out from the special verdict every fact which can be deemed any evidence of a tenancy from year to year, we are of opinion there must be a venire de novo.

Monday, July 4th.

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The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing.

But where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, *together with the liberty of boring for and getting the coal*, &c. it is not enough for the plaintiff to reply that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the *liberty* of working the mines: because the plea claims such liberty not merely as annexed to the seisin in fee to be exercised when in actual possession, but as a present liberty to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it.

TRESPASS for breaking and entering the plaintiff's close, part of the North Farm, otherwise *Lowstead Farm*, and another close, part of the Town Farm, in the township of *Backworth*, in the county of *Northumberland*, and subverting the soil, and digging and boring the same, &c. The defendant pleaded

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the general issue and six special justifications of the trespasses, as servants, and by command of the Duke of *Northumberland*. The 1st of these stated that the Duke, at the times when, &c. was and is seised in fee *of the manor of *Tynemouth*, with the appurtenances, in the said county, of which the closes in question have immemorially been parcel and copyhold tenements of the manor: and that *by reason thereof* the Duke was entitled to all *mines and veins of coal* in and under the same closes, &c. *and to bore for, dig for, and get such mines and veins of coal.* The 2d justification stated the same right in the Duke, *he making and allowing to the copyhold tenants of the said closes* in which, &c. and their tenants and occupiers thereof respectively *a reasonable satisfaction and compensation for all damages* done or occasioned to them respectively by such boring for, digging for, and getting such veins and seams of coal as aforesaid. The 3d stated that the places in which, &c. from time immemorial have been parcel of the said manor; and that the Duke is *seised in fee of and in the veins and seams of coal* lying within and under the copyhold tenements within and parcel of the same manor, *together with the liberty of boring for*, digging for, and getting such veins and seams of coal there, and *of doing all such acts as might or may be necessary* for those purposes, or any of them. The 4th stated the same right in the Duke as the 3d, he making and allowing to the said copyhold tenants, &c. (as stated in the 2d justification) reasonable satisfaction and compensation for all damages occasioned to them respectively by the boring for, digging for, and getting the said coals, and the doing such necessary acts as aforesaid. The 5th and 6th justifications were like the 3d and 4th, with the additional allegation that the Duke also was seised in fee of the *manor* of *Tynemouth*.

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The plaintiff demurred specially to the first and second justifications, because they do not allege *as a fact* that the Duke was entitled to bore for, dig for, and get the coal within or under the copyhold tenements of the manor, but alleges that he was so entitled *as a consequence of law*, arising from the fact of his being seised in fee of the manor: and because those pleas do not shew how the Duke's supposed right to bore for, dig for, and get the same coal, or to enter and dig in the close, &c. for that purpose, arose; whether by custom, prescription, grant, or how otherwise. And to the other justifications the plaintiff severally replied, that as well all the said veins and seams of coal within and under the same close in which, &c. as the rest of the soil and ground of and within and under the same, from time immemorial have been

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parcel of the manor, and demised and demiseable by copy of court-roll, &c. *without any exception or reservation thereout or therefrom of the mines or seams of coal within or under the said closes in which, &c. or either of them or any part thereof.* That before the said Duke was so seised of the said manor, the late Duke was lord of the same, and seised thereof, and at a court-baron, &c. granted the said closes in which, &c. to Sir *Matthew White Ridley* Bart. and *Charles Brandling* Esq. to hold to them and their heirs at the will of the lord, &c. and the survivor of them demised to the plaintiff, &c. The defendant demurred specially to these replications to the pleas, because they do not directly traverse, nor confess and avoid, the matters of the said pleas, and are argumentative and not issuable. The case was argued in the last term.

Holroyd for the plaintiff. The principal question is, Whether, without any special custom, or special reservation of the mines, the lord has a right to enter upon the copyholder's land and dig for coals there, either with or without making him compensation for the injury done to the surface. The defendant by his pleas admits the lands to be copyhold; and the plaintiff by his replications to some of them alleges that they have been immemorially demiseable by copy, without any reservation of the mines of coal. Where there is a grant of the land itself, all above and below the surface passes with it *(a)*, unless specially reserved. This indeed is not the nature of the copyholder's estate; for without a special custom he cannot dig the mines under his copyhold; nor can he cut trees except for special purposes, as for repairs, or toppings and loppings for fire-bote; because, not having the freehold of inheritance in him, it would be waste. If the mines were reserved out of the grant, though no waste could be committed of them, the tenant digging for them would be a trespasser. But where any estate or interest in land is granted, the lessee or grantee takes not only the surface, but all above and below it; and no other can break the soil, without committing a trespass upon the tenant's possession. If mines were opened before, the tenant may dig and take the profit thereof; which shews that the mines themselves are granted, though it be waste in him to dig for any new mine without licence *(b)*. Where the mines are expressly reserved to the lord, that may be an implied reservation of his right to enter and dig for them: but without such express reservation, or a custom

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(a) 1 *Blac. Com.* 18. *(b)* *Saunders'* case, 5 *Rep.* 12 *Co. Lit.* 54. *b.*

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reserving the right to the lord, which is equivalent, it would be derogatory to his grant to enter and dig where he has granted the land generally. The copyholder is clearly entitled to all the profits of the soil, of part of which he must be deprived, *if the lord may enter upon and dig the soil for coal, which cannot be [*193] procured without a great destruction of the surface about the opening of the mine. The lord, therefore, having parted with the right of possession to the whole during the time of the grant, must necessarily be a trespasser if he enter upon the copyhold. The general rule is, that every grant is to be taken most strongly against the grantor, within the words of it. With respect to the particular case of copyholds, in *The Earl of Kent* v. *Walters (a)*, *Northey* having contended that by the general custom of copyholds the lord might cut trees on them, for otherwise, if it were a copyhold in fee, the wood would never be cut, which would be inconvenient; Lord *Holt* denied the lord's right; and said that the copyholder had the same interest in the trees that he had in the land. And in *Ashmead* v. *Ranger (b)* this Court held that trespass lay against the lord for entering and cutting down trees on the copyhold; Lord *Holt* again affirming his former opinion, that the tenant had the same customary or possessory interest in the trees that he had in the land: and adding, that if the lord had a mind to cut trees, he must compound with the tenant. This judgment was affirmed in the Exchequer-chamber by all the Judges: but it appears *(c)* to have been afterwards reversed in the House of Lords by 11 against 10; because the tenant could not cut the trees, and if the lord could not, they must rot on the land; for then nobody could. At most that judgment can only conclude that particular case. That mines pass by the general grant of an estate appears from *Clavering* v. *Clavering (d)*, where tenant for life amesnable for waste was held entitled to [194] open new shafts for the further working of an old vein of coal. But the point now in judgment seems to have been decided in *Player* v. *Roberts (e)*, where the case is put that a man grants the coal and coal mines within a manor, parcel of which was copyhold, held for life, to *J. S.*: the lessee (stated by mistake for the lessor) enters on the copyhold, and digs a new pit there, during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine

(a) 12 *Mod.* 317. (b) *Ib.* 378. *Com. Rep.* 71. and 1 *Ld. Ray.* 552.
(c) 11 *Mod.* 18. and *Salk.* 638. (d) 2 *P. Wms.* 388.
(e) *W. Jones*, 244.

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brought trover against the lessor: and held that he might; for neither the lessee, nor the lessor, could enter on the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close and digging of the coals: but, that when the coals were dug out of the pits by the lessor, or lessee, or by a stranger, they belonged to the lessee, who should have trover against any one who took them. In *Lyddall* v. *Weston (a)*, upon a question whether the plaintiff could make a good title, Lord *Hardwicke* C. said that there was no instance where the crown had only a bare reservation of royal mines, without any right of entry, that it could grant a licence to any person to come upon another man's estate, and dig up his soil and search for mines; and he thought that the crown had no such power. But when the mines were once opened, the crown may restrain the owner of the soil from working them, and may work them on its own account, or grant a licence to others to do so. In *The Bishop of Winchester* v. *Knight (b)* the facts were, that a customary tenant holding under the bishop had opened a copper mine where none had been
[195] before, and dug out and sold great quantities of ore, and after his death his heir had continued to dig for and dispose of other copper ore. The bishop filed his bill against the executor and heir for an account. Lord Chancellor *Cowper* considered that the executor would be liable, if the tenant had no right; but this being a question at law, and doubtful upon the evidence before him, he directed an action of trover to be brought by the bishop against the then tenant; which the report states was tried: and there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines. So that upon the producing of the postea, the Court held that neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, could dig in these copper mines, being new. And, lastly, in the case of *Grey* v. *The Duke of Northumberland (c)*, Lord Chancellor restrained the lord of the manor from opening a mine, which he was preparing to do, upon the plaintiff's copyhold land.

The question upon the pleadings was also discussed by the counsel on both sides; but it is sufficient to refer to the opinion of the Court upon this point.

Hullock contrà. It is admitted that the freehold is in the lord, and that he has a right to all mines under the surface of the

(a) 2 *Atk.* 20. (b) 1 *P. Wms.* 406. (c) 13 *Ves. jun.* 236.

copyhold;

copyhold; and that when severed and taken by any other, the property is in the lord, and he may recover it in trover. The question then is, Whether having a clear right of property in the subject-matter, he has not necessarily incident to that right, the power of taking it? A copyholder, in the origin of the tenure, was a mere tenant at will; and at this day can derive no other rights to his estate than what have in fact been exercised from all time, and which are therefore given to him by the custom of the manor. In every instance of the exercise of a right of property over his estate, it lies upon him to shew a custom for what he claims; and whatever he cannot claim by custom remains in the lord, whose rights are reserved to him by the common law, and are not dependant on the custom. The lord might originally have granted the copyhold with what reservations he pleased; and it must be presumed that he reserved every part of the copyhold which the custom does not shew that he granted to the copyholder, with all the powers incident to the enjoyment of such reservation. [Lord *Ellenborough*, C. J. In the absence of all other evidence of the grant than the custom, does not the absence of any custom either for the lord or the copyholder to open mines shew what the terms of the grant were?] The origin and nature of this kind of estate must be attended to. The copyholder's estate has grown out of encroachments on the lord. Even at this day the grant does not operate as a common law-grant would. Nothing passes by it but the mere use of the surface of the soil: the trees and mines still remain in the lord, in whom is the freehold of the whole. The lord's rights must either be taken to have been reserved out of the original grant, if any, or to be excepted by the common law; for certainly they are not derived from the custom. In *Folkard* v. *Hemmett* and others *(a)* where, in case by a commoner against a stranger for digging the soil and erecting buildings on the common, the defendant justified under a grant of the soil by the lord with the consent of the homage according to the custom; Lord C. J. *De Grey*, after hearing evidence of similar grants by the lord for a long period back, said he would not call it a custom, but a usage; because he considered it as a reserved right of the lord; and that it was legal. If mines be expressly reserved to the lord in a grant, the law would reserve his right of entry and digging there, as incident to such reservation. And the legal effect of an exception or reservation by the law cannot be less beneficial than if it were by the

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(*a*) Sittings after *Easter* 16 *Geo.* 3. C. B. 5 *Term Rep.* 417. note.

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act of the party. The lord's right, however, is rather an exception, which as Lord *Coke (a)* says, is ever of part of the thing granted and of a thing in esse, than a reservation, which is always of a thing newly created or reserved out of the land demised. Then the law excepts every thing which is incident to the enjoyment of the thing excepted; and when it gives any thing to one, it gives impliedly whatsoever is necessary for the taking and enjoying the same *(b)*. If trees be excepted in a lease, the law gives the lessor and those who would buy of him power to enter and shew the trees. So it gives power to him who has a conduit in the land of another to enter and mend it when needful. *Liford's* case *(c)*. In the case of mines *(d)*, it was held by all the judges that the king, having by his prerogative a right to all gold and silver mines throughout the realm, had also the liberty to dig and lay the same upon the land of the subject, and carry it away from thence: which is directly against what is said by Lord *Hardwicke* in *Lyddal* v. *Weston (e)*. If one have a right of way over another's land, he may enter to repair it *(f)*. If this right of the lord affect the copyholder's enjoyment, it is because of the nature of his tenure: and though every grant is to be construed most strongly against the grantor, that only applies to that which is meant to pass, but not to an interest which it is admitted did not pass. The case of *Player* v. *Roberts (g)* was a question of property between the lord and the lessee of the coal mine, concerning coal severed from the mine; and no doubt the property when raised was in the lessee; whether rightly dug or not; and therefore all that was said in respect of the right to dig was beside the point in judgment. But the final determination of the lords in *Ashmead* v. *Ranger (h)*, is a direct authority upon principle to govern this case. The cases of trees and of mines are in every respect analogous. The right to both when severed is in the lord; with the exception of such trees the tenant is entitled to take for repairs. Then if the lord were adjudged to have a right to come upon the land, and cut down and take the timber as incident to his right to it when standing; by the same rule he must have an equal right to take the coal or metals under the surface in the only way in which they can be

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(*a*) *Co. Lit.* 47. *a.*
(*b*) 2 *Inst.* 306. *Co. Lit.* 56. *a.* and *Finch's Law*, 63.
(*c*) 11 *Rep.* 52. and *Perk*, s. 111. and vide *Hodgson* v. *Field*, 7 *East*, 613.
(*d*) *Plowd.* 313. 323. 336.
(*e*) 2 *Atk.* 20. (*f*) *Finch's Law*, 63. (*g*) *W. Jones*, 244.
(*h*) *Salk.* 838. and 11 *Mod.* 18.

gotten,

gotten, by digging for them. The judgment of the lords there was conformable to the opinion delivered in *Heyden* v. *Smith* (*a*); where in trespass by a copyholder against the lord's bailiff for entering his close and cutting down a timber tree; the fourth resolution was, that the lord cannot take *all* the timber trees; [199] but he ought to *leave sufficient* for the reparation of the customary houses, &c. And in the report of the same case in *Godbolt*, Lord *Coke* says, that "without any custom the lord may "take the trees, if he leave sufficient to the copyholder for the "reparations." There are also other authorities to that effect (*b*). In the case of *The Countess of Rutland* v. *Gie* (*c*), the Court denied a prohibition to restrain a rector from digging for lead in his glebe; saying, that if he could not dig mines in his glebe, all the mines under all the glebes in *England* must remain unopened. And *Twisden* J. thought that the lord might open a mine in a copyhold of inheritance; though *Foster* and *Keeling* Js. thought that he could not. Upon the whole there is no decided case against the lord, and all legal analogies and principles are with him; for it is absurd and against public policy, that the owners of so great a mass of property should be precluded by law from the enjoyment of it.

Holroyd, in reply, upon the general question, said that if a mine, lime pit, or stone quarry, were once lawfully opened upon the copyhold, the copyholder may dig and enjoy it; which shewed that an interest passed to him in the land beyond the mere use of the surface. It is also shewn by this, that if the copyholder himself open a new mine, it is *waste* in him: whereas if no interest passed to him in it, it would be a trespass, and not waste; and therefore not a forfeiture of the copyhold. Even as to trees, it is said in the 5th resolution of *Heydon* v. *Smith* (*d*), that the copyholder may maintain trespass against the lord, [200] for breaking and entering his close, and cutting *arborem suam*. And in *Folkard* v. *Hemmett*, the lord's right was claimed and supported by *usage;* which was evidence of an express reservation in the original grant of the right of common.

Curia adv. vult.

Lord ELLENBOROUGH C. J. This was an action of trespass. The defendant pleaded six justifications. The first stated that

(*a*) 13 *Rep.* 67. *Brownl.* 328. and *Godb.* 172.

(*b*) 1 *Leon.* 272. case 365. *Ayray* v. *Bellingham*, *Finch's Rep.* 199. 2 *Brownl.* 200.

(*c*) 1 *Sid.* 152. 1 *Lew.* 107. and 1 *Keb.* 557. (*d*) 13 *Rep.* 68, 9.

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the Duke of Northumberland is seised in fee of the manor of *Tynemouth;* that the places in which, &c. have immemorially been *copyhold tenements* of that manor; and that *by reason thereof* the Duke is intitled to all mines and veins of coal, in and under the said closes in which, &c., and to bore for, dig for, and get such mines and veins of coal. The second justification states that the Duke had the right above-mentioned, *making and allowing to the copyhold tenants of the said closes in which, &c. and their tenants and occupiers thereof respectively, a reasonable satisfaction and compensation for all damages* done or occasioned to them respectively by such boring for, digging for, and getting such veins and seams of coal as aforesaid. To these two first justifications the plaintiff had demurred, and has assigned for cause, that the existence of the right (so claimed as aforesaid) is alleged, not as a fact, but as a consequence of law from the Duke's being seised of the manor. The third justification states that the places in which &c. from time whereof &c. have been copyhold tenements of the manor of *Tynemouth;* and that the Duke is *seised in fee of all the veins and seams of coal* lying *within and under the copyhold tenements* of the manor *together with the liberty of boring for, digging for, and getting such veins and seams of coal there, and of doing all acts necessary for those* [201] *purposes;* and justifies under that right. The fourth is the same with the third, except that it adds, that *compensation* is to be made for damages, as the second does. The 5th and 6th are like the 3d and 4th; but they add that the Duke is also seised of the *manor.* To each of these four last justifications the plaintiff has replied, that as well the said veins and seams of coals lying under the said closes in which &c., as the rest of the soil and ground of and within and under the said closes in which &c., from time immemorial have been parcel of the said manor, and demised and demiseable by copy of court-roll, *without any exception or reservation of the mines or seams of coal* within or under the said closes, in which &c. or either of them, or any part thereof; that the said closes in which &c. were granted to Sir *M. White Ridley* and *Charles Brandling* Esq., to hold to them and their heirs, at the will of the lord &c., and that they demised them to the plaintiff. To each of these replications the defendant has demurred, and has assigned for cause, that they do not strictly traverse, or confess and avoid, any of the matters contained in the pleas, and are argumentative, and not issuable.

Upon these pleadings, therefore, there are two questions; the one, a general one, whether the lord of a manor has, as lord, a right to

to enter upon the copyholds within the manor, if there be mines and veins of coals under them, and bore for and work such mines or veins? the other, a question of mere form, whether the replication to the last four justifications sufficiently confess and avoid them; or whether they ought not to have traversed the liberty of digging stated in the justifications.

As to the first, if such a right as is claimed exist, it is singular that it is not noticed in any of the books which treat of manors and copyholds; that it is now for the first time brought forward; [202] that not a single instance is given of the exercise of it; and that with the single exception of a dictum in *Rutland* v. *Greene*, what authorities there are upon the point are all against it. *Rutland* v. *Greene* is in 1 *Keb.* 557. 1 *Sid.* 152. and 1 *Lev.* 107. The case was this; a parson opened a mine upon his glebe: the patron moved for a prohibition to restrain him under the equity of the statute, 35 *Ed.* 1. *st.* 2. The Court thought him entitled to open and work the mine; because, otherwise, none of the mines under glebe lands throughout *England* would be opened. But it being urged that this was the only way the patron had to try his right, the Court granted a rule. *Siderfin* adds, "the same law seems of a copyholder of inheritance. Quære bien." Whether this were his own conclusion, or collected from what fell from the Court does not appear: but if any inference is to be drawn from it, it is, that *the copyholder* may open the mine, not the *lord*. *Levinz* says nothing as to lord or copyholder: but *Keeble* says "*Twisden* conceived the lord may open a mine in a copyhold of inheritance." *Foster* held it a trespass; and *Keeling* conceived he could not do it. The utmost extent therefore of this authority is, that there is the obiter dictum of one Judge, viz. *Twisden*, against the obiter dicta of two others, *Foster* and *Keeling*. In *The bishop of Winton* v. *Knight*, 1 *P. Wms.* 406, Lord Chancellor *Cowper* held, that if there were no custom to regulate it, neither a customary tenant, without licence from the lord, nor the lord without licence from the tenant, could open and work new mines. In that case a customary tenant of the manor had opened a copper mine, and the lord filed a bill against him to account for the produce. It being doubtful where there was not a custom which would protect the tenant, the Lord [203] Chancellor directed the lord to bring an action of trover: but the custom appearing upon the trial not to be applicable, "the Court held, that neither the tenant, without the licence of the lord, nor the lord, without the consent of the tenant, could dig in these mines, being new mines." In *Player* v. *Roberts*, Sir *W. Jones*,

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W. Jones, 243. *J. N.* was copyholder for life: the lord granted all coal mines within his manor for 99 years to *Dimery*, who underlet to *Player*: *Dimery*'s term was afterwards surrendered to the lord, but *Player*'s interest was not extinguished: the lord opened new pits upon the copyhold, and took away the coal; upon which *Player* brought trover against him. Several points were moved; and the last was this: a man grants all his coal and coal mines within a manor, (and parcel was copyhold for life,) to *J. S.*: the lessee (this should be the lessor) enters the copyhold, and digs a new pit in the copyhold land during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine brings trover against the lessor: and, by the Court, so he may; for it is true, that *neither the lessee nor the lessor can enter upon the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close, and digging his coals.* But when the lessor or lessee or a stranger enters, and digs the coals out of the pits, they belong to the lessee; and if any other take the coals, the lessee shall have trover: and upon the whole matter judgment was given for the plaintiff. In *Gilbert Ten.* 327, the Lord Chief Baron says, "It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines: *neither can the lord dig in the copyholder's lands*, for the great prejudice he would do to the copyhold estate. Lastly, In *Townly* [204] *v. Gibson*, 2 *Term Rep.* 704—707, it had been urged in argument that the lord of the manor was entitled to the mines under the copyholds, unless there were some custom to exclude him: and *Buller* J. in delivering his opinion, said, "*I do not agree with the defendant's counsel that the lord may, unless restrained by custom, dig for mines on the copyholder's lands*: but it is not necessary to consider that question here." These authorities are in point; and though they are dicta only, not decisions, they are the dicta of great men, and they correspond with the usage on the subject. Valuable as the supposed right is, there is not a single instance shewn in which any lord has ventured to act upon it. The injury to the tenant would naturally have produced resistance on his part: the dicta above-mentioned would have encouraged that resistance: a suit would have been the consequence, and the result of such suit must have been known in *Westminster-hall:* and as none such is known, it may fairly be presumed that a litigation of that kind has not taken place.

The second question, whether the replications ought to have traversed

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traversed the liberty of working the mines, as stated in the 3d and subsequent justifications, depends upon the construction to be put upon those justifications. If they mean only, that the liberty is so annexed to the seisin in fee, as that, until the right of *actual possession* has accrued in virtue of the seisin, the liberty cannot be exercised; the replications have sufficiently confessed and avoided it by shewing that there is an outstanding copyhold estate, which suspends the right of actual possession. But if the pleas are to be considered as claiming the liberty *presently*, i. e. *during the continuance of the copyhold estate;* that liberty is not confessed and avoided by the replications, and there ought to have been a traverse. The latter seems to be the true meaning of these pleas: and indeed the pleas would be bad if it were not; for they [205] admit that the closes in which, &c. were *copyhold tenements at the time of the trespasses*, and insist upon the right to enter upon the copyholds. The defendant says, all the mines under the copyholds are the Duke's, and the Duke has a right to work them: the closes in question were subsisting copyholds at the time of the trespass, and therefore I entered under the Duke's right. The defendant therefore must have meant that the Duke's right was such as entitled him to work *during the copyholder's estate*. The word *liberty* too implies the same thing. It imports, ex vi termini, that it is a privilege to be exercised over another man's estate. A man's right of dominion over his own estate is never called a *liberty*. Now during the continuance of the copyhold, if the mine is to be worked, the lord must exercise a privilege over the copyholder's estate: but as soon as the copyhold is at an end, the surface will be the lord's as well as the coal, and he will have to work upon nothing but his own property. It requires then no reasoning to prove, that if the pleas claim the liberty during the continuance of the copyholder's estate, a replication that the copyholds have always been demised, *without any exception or reservation* of the mines or seams of coal, is not a confession of the liberty and an avoidance of it, but a mere argumentative denial of its existence; and as this is assigned specially as a cause of demurrer, it should seem that the replications are bad on this ground, and that the plaintiff ought to have leave to amend, or that there should be judgment for the defendant.

The plaintiff's counsel then prayed leave to amend his replication, which was granted.

Monday, July 4th.

DOE, on the several Demises of WEBBER, and the Dean and Chapter of EXETER, *against* Lord GEORGE THYNNE and Others.

Upon a question whether certain ancient books, from 1585 to 1693, preserved in the archives of the dean and chapter of *Exeter*, intituled *Rentals*, and containing columns of the names of their estates with the rents reserved on each, and *solvits* written in different hand-writings against such rents, were entries made by the receivers of the dean and chapter charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receivers' books, by shewing that the receivers of the dean and chapter for the last 60 years had kept their books of accounts in the same form.

AT the trial of this ejectment for premises, called the *Denn*, in *East Teignmouth*, in the county of *Devon*, before *Thomson* B., the title was stated to be either in *Webber* under a purchase from the dean and chapter of *Exeter* in pursuance of the land-tax redemption act, or remaining in the dean and chapter. And in order to prove that the dean and chapter were in possession of the *Denn*, several ancient books denominated on the outside *Rentals*, were produced from amongst the muniments of the dean and chapter out of their archives; some of them subsequent to the disabling statute of the 13 *Eliz. c.* 10. which appeared to contain entries of rent from time to time received by the dean and chapter in respect of the *Denn*. But it did not appear to the learned Judge that any of the books subsequent to that period purported to be the accounts of *receivers charging themselves* with these rents. The present receiver of the dean and chapter was then called on the part of the plaintiff to prove that he had held that office from 1803, and to produce his books, in order to shew that he kept his accounts *as receiver* in the same form in which the entries in the old books were made: which evidence the learned Judge thought *inadmissible to explain the ancient books and therefore non-suited the plaintiff.

A new trial was moved for in the last term, when the general form of the entries was stated to be, so much due as rent for the *Denn*, (amongst ather descriptions of property) and afterwards in a different hand-writing *solvit*, with a date, and in some instances *solvit in scaccario;* from which the lessors of the plaintiff wished to have inferred that it was the entry of the receiver charging himself, contending that the practice in modern times, as far back as living memory went, of keeping the books by the receivers of the dean and chapter, who had charged themselves in the same form, strengthened that inference. But at this

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distance

But it appearing that some of the entries in such books (though not the entries as to the rent of the estate in question) contained internal evidence of their being the books of receivers; by such entries as "solvit *mihi*," and "solvit *per me*." Signed with the initials *N. W.;* which entries imported that *N. W.* was therein accounting to the dean and chapter for money paid to himself, and with the receipt of which he debited himself; the Court directed a new trial, in order to have the inspection of the books again submitted to the Judge at Nisi Prius.

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distance of time it could not be told by whom those entries were made; and the books it was admitted came out of the possession of the dean and chapter; having been kept in their treasury, to which the receivers, it was said, had access. And in answer to a question by the Court as to the respective dates of the earliest and latest entries respecting the *Denn* in these books entitled *Rentals;* and how far back from the present time there was living evidence of the books having been kept in the same form by the receivers; it was answered, that the earliest date respecting the *Denn* was 1586, and the latest in 1693; and that there was evidence of the modern receivers having kept their books in the same form from 1746 to 1803.

Lens Serjt., *Courtenay,* and *A. Buller,* shewed cause in this term against the rules and contended against the admissibility of the evidence on the mere ground of probability that the books had been kept by receivers, who had thereby charged themselves with the receipt of the rents. They admitted that it was not necessary in [208] these cases where the entries were made at a distant time, to prove the hand-writing of the steward or receiver, which might be impossible to be done: but the evidence had never been let in except where the books or papers purported on the face of them to be the accounts of such persons delivered in to their employers, and charging themselves with the receipt of money on their account: as in *Barry* v. *Bebbington (a),* and *Stead* v. *Heaton (b).* Whereas the books in question purported to be *rentals,* which are documents of the property furnished by the owners themselves, or by their direction; and on that ground the like evidence was rejected in *Outram* v. *Morewood (c),* even as between third persons in a collateral inquiry: much less then can it be evidence for the owners themselves claiming the property. It does not at all appear but that the *solvits* may have been written by the different tenants, not to charge but to discharge themselves. The whole class of cases where receivers' accounts have been admitted is an exception to the strict rule against receiving in evidence the declarations (for these entries are no more) of facts by third persons; and therefore the rule ought not to be relaxed further than the cases have gone; which have only let in evidence of these documents purporting either from the general title, or upon the face of the entry itself in question, to have been made by a person charging himself to another, or admitting a fact against his own interest.

(a) 4 *Term Rep.* 514. (b) *Ib.* 669.
(c) 5 *Term Rep.* 121

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Pell Serjt., *Dampier*, and *Harris*, in support of the rule; after contending that the parol evidence offered of *the books having been kept by receivers for 60 years past in the same form was admissible to explain the manner in which the old books were kept; referred to the books themselves as containing internal evidence of their having been receivers' books. Some of them were entitled *debita quæ debentur;* others *Rentals;* in which latter the *solvits* were entered. In the first column are the names of the several estates; in the 2d the rents; in the 3d the entries of *solvit* with different dates, or of the sums remaining unpaid: many of the solvits are in the same hand-writing as the books themselves; the rest in different hand-writings. In particular they drew the attention of the Court to an entry in 1678, by which it appeared that part of the rent of an estate called *Branscombe* was first received, and the rest of the rent is afterwards entered as received in this form: "solvit residuum *mihi N. W.*;" and to another entry of "*solvit per me,*" with the signature of the same person. These they contended must have been entries by some person in the character of a receiver by reason of the words *mihi* and *per me*, and by which that person charged himself with the receipt. And that this was strengthened by the consideration that these were the books of a corporation, which can only keep its books by the medium of some officer, who must at all events be responsible to the general body.

The Court desired to have an inspection of the books themselves, from whence they were called upon to infer the character of the persons by whom the entries were made: and the case stood over for further examination of them till the end of the term, when

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Lord ELLENBOROUGH C. J. said—The motion for a new trial in this case has been made on the ground of the refusal of the judge to receive in evidence comparatively modern receivers' books, in order to lay a foundation for presuming, from a comparison between the two, that certain other ancient books kept in the same manner, and containing like entries of receipts and payments, were also receivers' books, and entitled to be read in evidence as such. We are of opinion, that the similitude which appears upon the entries to exist between the ancient and modern books does not lay a safe and adequate ground for presuming that, because the later books are known and can be proved to have been kept by receivers of the dean and chapter of *Exeter*, and accounted upon as such, therefore the former books were kept by persons of the same description and character, and made and used for the like purpose.

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purpose. We therefore cannot grant a new trial for the rejection of the evidence offered for this purpose, upon the ground on which it has been prayed. But inasmuch as upon inspection of the original ancient books, we think they do contain very strong *internal* evidence of their actually being receivers' books; the language of several entries importing that one *Nicholas Webber* was therein accounting to the dean and chapter for money paid to himself, and with the receipt of which he therein debits himself: such as "solvit mihi," "solvit per me:" We are of opinion that it is fit that a new trial should be granted, for the purpose of submitting the quality and character of these books, and the question of their admissibility as receivers' books, again to the consideration of the Judge, upon a further inspection of the contents of the same.

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Tuesday, July 5th.

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One who has not taken the sacrament within a year, being incapable of being elected into a corporate office by stat. 13 *Car.* 2 *c.* 12. his disqualification was held not to be removed by the annual act of indemnity (47 *G.* 3 *st.* 2 *c.* 35.) the 6th section of which restrains its operation in cases where the office shall have been "already legally *filled up and enjoyed* by any "other person," at the time of passing the act: the fact being, that the defendant and another were candidates at the time of election, when 40 electors were assembled; and after 2 electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affirmative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being 20 in number, except 2 or 3; and 16 afterwards voted for the other. Held,

1. That all the votes given for the defendant after such notice were thrown away.

2. That the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice.

3. That the presumption of law being that every person has conformed to the law till something appear to rebut that presumption; it must be taken that the other candidate, who affirmed his qualification, which was not negatived by the jury, was duly qualified; and that such his election, perfected by swearing-in, was a *filling up and enjoying* by him of the office, within the proviso of the indemnity act, so as to preclude its operation by relation in favor of the defendant.

THIS was an information in the nature of a quo warranto, calling upon the defendant to shew by what authority he claimed to be an alderman of the borough of *Saltash;* to which the defendant pleaded, setting out the constitution of the borough under the charter of the 14 *Geo.* 3. which constituted seven aldermen, one of whom was to be mayor and another justice of the peace, and an indefinite number of free burgesses; and ordained that when any of the aldermen should die or be amoved from their offices, the mayor, justice of peace, and the rest of the

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aldermen and free burgesses, or the major part of them, should elect one of the free burgesses inhabitants of the borough to supply the vacancy; and that the person so elected should hold the office of alderman for life unless amoved; he first taking his oath before the mayor, or justice of the peace, or two or more aldermen, or, in default of these, before four or more free burgesses inhabitants, well and truly to execute his office, &c. The
[212] plea then stated the acceptance of the charter, and that afterwards, on the 6th of *November* 1806, *R. Thomas* an alderman died; and that on the 18th of *December* 1806 the mayor, justice of peace, and the four other aldermen duly assembled at the Guidhall to elect an alderman in his room, and did elect the defendant, then being a free burgess and inhabitant of the borough, to be an alderman, who was in due manner sworn in before the mayor; and so he made title to the office. The replication, admitting the due assembly of the corporation to make an election, took several issues, 1. That the defendant was not duly elected at that assembly. 2. That he did not duly take an oath of office before the mayor; and 3. that he was not duly sworn into the office: and on issues joined, a special verdict was found stating that on the 18th of *December* 1806, the place of one of the aldermen of the borough being vacant, the mayor, justice of the peace, and the rest of the aldermen, and 34 of the free burgesses, assembled in the Guildhall of the borough on due notice, in obedience to a writ of mandamus from *B. R.* commanding them to proceed to the electing and swearing-in of an alderman in the place of *R. Thomas* deceased. That at that assembly the defendant and *Peter Spicer*, being free burgesses inhabitants of the borough, were proposed as candidates. That after two voters had voted for the defendant, and two other voters for *P. Spicer*, and before any other person had voted or offered to vote for the defendant or *Spicer*, *C. Carpenter* as agent for *Spicer* asked *Spicer* whether he had taken the sacrament within a year; to which *Spicer* answered that he had; but no other evidence of this fact was given to the jury. *Carpenter* then put the same question to the defendant, who answered that he had not. Whereupon *Carpenter* notified
[213] and declared to the mayor, justice of the peace, aldermen, and free burgesses so assembled, and in their hearing, that the defendant was on that account ineligible, and incapable to be elected an alderman; and that if any voter should after that notification give his vote for the defendant, such vote would be thrown away and void. And *Carpenter* then and there publicly read the 12th section of the stat. 13 *Car.* 2 *c.* 12. After which 20 voters voted for

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for the defendant, all of whom except 2 or 3 were present when the notification of the ineligibility of the defendant was made, and heard the same: and 16 voters voted for *Spicer*. That the defendant was thereupon sworn in by the mayor, and took the usual oaths. That *S. Drew*, one of the aldermen, in the hearing of the mayor, justice, aldermen, and free burgesses so assembled, declared that *P. Spicer* was duly elected alderman; and *Spicer* was also thereupon tendered to the mayor to be sworn in and offered to take the usual oaths. But the mayor refused to swear him in: whereupon he was sworn in by *Drew* and *Gaborion*, two of the aldermen. That the defendant had not taken the sacrament according to the rites of the church of *England* within a year before the election; but he took it afterwards on *Sunday* the 4th of *October* 1807. But whether the defendant were duly elected an alderman, or duly took his oath of office before the mayor, or was duly sworn into the office, the jurors pray the advice of the court, and find the issues accordingly.

This case was argued on two former days in this term by *Adam* jun. for the prosecution, and *A. Buller* for the defendant; but as all the points made and authorities cited were fully noticed by the Court in delivering their judgment, it is unnecessary to repeat them.

Lord ELLENBOROUGH C. J. on this day delivered judgment.— [214]
This was an information in nature of a quo warranto, to know by what authority the defendant, *Edward Hawkins*, claimed to be an alderman of the borough of *Saltash*. The defendant, by his plea, states the charter of the 7th of *June* 14 *Geo.* 3., which directs the election of aldermen to be made in the following manner: That whenever it shall happen that any of the aldermen of the said borough for the time being shall die, or be amoved from their offices, then and so often it shall be lawful for the mayor, justice of peace, and the rest of the aldermen and free burgesses of the said borough, for the time being, or the major part of them, to elect or prefer one or more of the free burgesses, inhabitants of the said borough, alderman or aldermen, to fill up the number of seven aldermen of the said borough; and that the person or persons so elected should hold the office for life, or until amoved; he or they so elected first taking his or their corporeal oath or oaths before the mayor, or justice of the peace of the borough, for the time being, or two or more of the aldermen of the said borough, or in default of the mayor, justice, or aldermen, but not otherwise, before four or more free burgesses inhabitants of the said borough. That on a vacancy of an alderman by the

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death of *Richard Thomas*, the mayor, justice of peace, and four aldermen, being the rest of the aldermen, and divers of the free burgesses, duly assembled on the 18th *December* 1806, at the Guildhall in the said borough, and did then elect the defendant, being a free burgess and inhabitant, to be alderman in the room of the said *Thomas;* and that after his election, and before he took on himself the office, he was duly sworn before the mayor.

[215] The replication to this plea puts in issue first, his election in manner and form as stated: secondly, his taking in due manner his corporeal oath before the said mayor: thirdly, his being duly sworn into the office. On these issues the jury find a special verdict. [Then after stating the facts found by the jury, his Lordship proceeded—]

On this state of facts it is clear, that at the time of the election, namely, on the 18th of December 1806, the defendant *Hawkins* was incapable of being elected into the office of alderman of the borough by the express prohibition of the stat. 13 *Car.* 2.; it having been admitted by himself at the time, and it being now stated as a fact by the special verdict, that he had not taken the sacrament within a year next before such day of election. But he founds his right to retain the office on the subsequent indemnifying act of the 47th of the king; he having since qualified himself by taking the sacrament within the time for that purpose limited by such act; whereby he is discharged from all disabilities and incapacities before incurred, and is recapacitated and restored to the same state and condition as he was in before such neglect and omission in the most ample manner; subject to the proviso in the 6th section of the act (*a*) which is "that this act or "any thing herein contained, shall not extend or be construed to "extend to restore or entitle any person to any office or employ-"ment, benefit, matter or thing whatsoever, already actually "avoided by judgment of any of his majesty's courts of record, *or* "*already legally filled up and enjoyed by any other person;* but that "such office or employment, benefice, matter or thing so avoided

[216] "or legally filled up and enjoyed, shall be and remain in and to the "person who is now, or shall at the passing of this act be, legally "intitled to the same, as if this act had never been made:" and this brings it to the questions of *Spicer's* election: for if the office or place of alderman of this borough were legally *filled and enjoyed by Spicer*, then the present defendant is not entitled to the

(*a*) 47 *G.* 3. *st.* 2. *c.* 33. *s.* 6. which is the same as sect. 5. in the stat. 42 *G.* 3. *c.* 23. in the last edition of the printed Statutes.

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benefit of this indemnifying or recapacitating statute. As to *Spicer's* qualification or capacity to be elected, we must take it that he was duly qualified by having taken the sacrament within a year: on the question put to him at the time, he declared that he had done so, and such allegation is not negatived by the verdict: and according to the authorities alluded to in the argument, viz. *Powell* v. *Milbanke* (*a*), *Williams* v. *The East India Company* (*b*), and *Monk* v. *Butler* (*c*), the presumption, that every man has conformed to the law, shall stand till something shall appear to shake that presumption. Was he, *Spicer*, then duly elected on the 10th *December* 1806? That question depends on the effect of the notice given to the electors of the incapacity of the other candidate, *Hawkins*, to be elected. There is no objection to the due holding of the assembly to elect: 40 persons duly qualified to vote are stated to have been present; viz. the mayor, the justice, four aldermen, and 34 free burgesses: *Hawkins* and *Spicer* are proposed as candidates; and after two persons had voted for *Hawkins*, and two for *Spicer*, notice is given of the fact creating *Hawkins'* incapacity (which fact he at the time himself acknowledges), and that all votes given for him after that notice would be void and thrown away; and the incapacitating clause of the statute *Car.* 2. is publickly read: and all this is found [217] to have been in the presence and hearing of all who afterwards voted for *Hawkins*, except two or three. After this notice, 20 persons voted for *Hawkins*, and 16 for *Spicer;* these numbers, with the two votes before given to each of the candidates, making up the full number of 40. If the law be, that at the election of corporate officers, the votes given for an incapable candidate, after notice of such incapacity, are to be considered as thrown away, i. e., as if the voters had not given any vote at all; then this will be a good election of *Spicer;* unless the time when notice of his incapacity was given, namely after two persons had given their votes for each of the candidates, can be considered as making any difference. The general proposition that votes given for a candidate, after notice of his being ineligible, are to be considered the same as if the persons had not voted at all, is supported by the cases of *The Queen* v. *Boscawen, Easter*, 13 Anne, *The King* v. *Withers, Easter*, 8, *G.* 2. *Taylor* v. *Mayor of Bath, M.* 15 *G.* 2., all which are cited in *Cowper* 537, in the *King* v. *Munday*. In the first, *Boscawen* and *Roberts*, the two candi-

(*a*) 3 *Wils.* 362. 366. and 2 *Blac. Rep.* 852. (*b*) 3 *East*, 192.
(*c*) 1 *Rol. Rep.* 83. and vide *Dr. Harscot's* case, *Comb.* 202.

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dates had an equal number of votes; but because *Boscawen* was incapable, the votes given for him were considered as thrown away, and the other duly elected. In the second case, *Withers* had 5 votes out of 11; and the other six refusing to vote at all, the Court held *Withers* duly elected; and that the six who refused to vote were virtually consenting to the election of *Withers*. In the third case, *Taylor*, *Bigg*, and *Kingston*, were candidates: *Bigg* was objected to as a disqualified person; notwithstanding which *Bigg* had 14 votes, *Taylor* 13, and *Kingston* only 1.

[218] There Lord Chief Justice *Lee*, at *Nisi Prius*, directed the jury, that if they were satisfied that the electors had notice of *Bigg's* want of qualification, they should find for the plaintiff; (that was *Taylor*, who had only 13 votes;) because *Bigg* not being qualified was to be considered as a person not in esse, and the voting for him a mere nullity. The jury found for the plaintiff: and the Court, on motion for a new trial, agreed with the law as laid down by Lord Chief Justice *Lee*, and refused a new trial. And in *The King* v. *Munday*, in *Cowper*, and *The King* v. *Coe*, in the 27th of the present king, *Hil. Term*, this doctrine was not denied; although the cases then before the Court went off on other points. Is there then any solid distinction between the cases I have alluded to, as establishing the general proposition, and the present case, on account of the notice of the disqualification of *Hawkins* having been given after two persons had voted? We think there is not: there still remained 36 persons to vote, of whom 16 only voted for *Spicer*, and 20 for *Hawkins:* although we are not prepared to say, that if the notice had been given in a more advanced stage of the poll, it would have made any difference, provided the number of votes given for *Hawkins* without notice of his incapacity had not been equal to those given for *Spicer*. *Spicer* having been therefore in our opinion duly elected into the office of alderman, and having been sworn in before two of the aldermen, who have by the charter authority to administer the oaths, the office was legally *filled up and enjoyed* by him; for we know not of any other enjoyment of such office, except being duly elected, accepting the office, and being sworn in. Under these circumstances, we think the defendant *Hawkins* is excluded

[219] from the benefit of the indemnifying act of the 47th of the king, by the proviso contained in the 6th section; and that in consequence there must on this special verdict be judgment for the crown.

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Tuesday, July 5th.

R. H. BEAUMONT appealed against the rate for relief of the poor of the township of *Mirfield*, in the West Riding of *Yorkshire* for certain underwoods in that township; and the sessions quashed the rate, and stated specially, that the woods for which the appellant was rated are certain underwoods in *Mirfield*, which are usually sold and cut down once in 21 years; and when so sold and cut down produce actual profit to the appellant, and not before. That these underwoods have not been cut down and sold for 10 years past, but are now standing to complete 21 years' growth. That by the act of 36th *Geo.* 3. for dividing and inclosing the commons within the parish of *Mirfield*, it was enacted, that "all woods within the said parish of or above 14 years' growth since the last fall shall be titheable, and liable to the payment of tithes at the next fall thereof, but no longer: yet that all such woods shall continue liable to rates and assessments annually, in like manner as they have heretofore been, notwithstanding any thing herein contained to the contrary." And the Sessions submitted to this Court, Whether the woods are *saleable underwoods* within the meaning of the stat. 43 *Eliz. c.* 2. and liable to be rated *every year*, according to the annual average thereof, or only *when cut down and sold*, and therefore then only producing actual profit.

Saleable underwoods are rateable annually to the relief of the poor, within the construction of the stat. 43. *Eliz. c.* 2. in proportion to their value though they should happen not to be cut down more than once in 21 years: and their annual value may be estimated, amongst other ways, according to the value they may be worth to rent for a lease of the duration of their intended growth.

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Topping, *Lambe*, and *Christian*, in support of the order of sessions, (after laying out of the case the private act of Parliament referred to, which it was admitted on all hands had no bearing upon the question,) contended that *underwoods* cut periodically, as these are stated to be, are not rateable within the words and meaning of the stat. 43 *Eliz. c.* 2. except in the years when they are cut for sale, in which state only they can be deemed "*saleable underwoods*." In order to make any species of property annually rateable, the property itself must produce profit within the year; though the actual occupier need not derive that profit; as if it be absorded in his rent: and therefore where a coal mine, becoming unproductive, ceased to be worked altogether; though the occupier was still bound by his covenant to pay the rent reserved; it was held not to be rateable (*a*). If

(*a*) *Rex* v. *The Inhabitants of Bedworth*, 8 *East*, 397.

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the legislature had meant that underwood in the progress of their growth should be rateable according to their average annual value, there would have been no occasion to introduce the word *saleable*, and such a construction will make it nugatory. But that word is significant, and was introduced from the necessity of the case, which requires that the subject should only be rateable when it is in a state capable of yielding profit to the occupier: *saleable* was used rather than *sold;* because the owner might chuse to use it for his own purposes; and it means when the underwood is in a fit state to be sold, according to the mode of husbandry there used. Where underwoods are extensive, a certain proportion is usually cut every year, and no difficulty can occur in rating it: but where those in the same occupation are by
[221] the custom of the country cut at the end of a stated number of years, it would be extremely offensive to tax the actual occupier for that which he may never enjoy. It would be hard that a tenant for life in possession, who would be restrained from cutting before the proper time, should be obliged to pay rates for a property wholly unproductive to him at the time, and which he might probably never enjoy. Till the underwoods are actually cut, the occupier is not furnished with the means of paying the rate, which the law contemplates is to be levied out of the subject-matter of it. He has no ability to pay, unless he chance to have other property. No distress could be levied upon the wood while standing. Besides, how can it be told beforehand, whether any or what proportion of it will be cut before it has become timber, in which state it is not rateable at all. The owner is not obliged to decide beforehand. It will be equally difficult to ascertain what is the average annual value of property which is not to be sold for 20 years to come; as it must depend upon the state of the market at that time. In *Rowls* v. *Gell (a)*, Lord *Mansfield* considered the poor's rate as a personal charge by reason of the *annual profits* out of the land.

Holroyd contrà. The legislature meant that all visible property from whence profit was derived at stated periods should contribute its proportion to the maintenance of the poor: amongst others, *underwoods* are expressly named; and the introduction of the word *saleable*, importing, as applied to the subject-matter, that which is generally grown and adapted for sale according to the custom of the country, might be in contradistinction to un-
[222] derwood casually applied to the purposes of the farm. The

(*a*) *Coup.* 452, 3.

subject-

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subject-matter is of annual growth, and is continually increasing in value; and the average annual value of this, as of every other species of productive property, is easily ascertainable, by calculating what it would be worth at the time, with a restriction of cutting it till a certain period. And there is in fact an annual increase of profit if the owner chuse to avail himself of it: and it may be in general presumed that he only suffers it to continue its growth for several years more or less, because he finds that to be a more beneficial mode of enjoying it than by annual cuttings. In the mean time his ability is increased by the increase of its value. No inconvenience can ensue to tenants for terms of years; for they will make their bargains with the owners of the inheritance accordingly; and to those owners it must be the same thing. Nor will any injustice be done to tenants for lives, to whom this mode of rating may be as beneficial on the one hand, as burthensome on the other, and who must take their estate cum onere: and with respect to the parish at large there can be no question that it must be more beneficial to have the burthen fall as equally in every year as it can be. Whatever inconveniences there may be from this mode of rating, arise unavoidably out of the subject-matter. Corn is an annual product, and is in fact only productive when cut down; and yet if a rate were made weekly or monthly, as it may be, the occupier must be rated for his own corn-field pro ratâ; and it would be no answer to say that it had not as yet produced him any profit, or that he should give up the occupation of it before harvest. Then what difference is there in principle between the case of corn and underwood?

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Lord ELLENBOROUGH C. J. In general the owners of this kind of property are in the habit of cutting certain proportions of it every year: but where the extent of it is too small to adopt this course, there may be a difficulty in rating it annually. There is great difficulty however on the other hand in attaining any thing like equality by adopting a different mode of rating: for if the property is only to be rated when it is cut once in 21 years; instead of its quota of the rate contributing equally through the whole period, it throws a glut into the fund in that one year, and is barren all the rest of the period: and if the owner has other property in the parish, he will pay so much less for that in the same year when his ability is increased. However, as it is a case of extensive consequence, we will consider further of it. Near the end of the term his Lordship delivered the opinion of the Court.

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This was an appeal against a poor rate for the parish of *Mirfield*, in which the appellant, *Henry Beaumont* Esq., was rated for some underwoods. The underwoods were such as are usually cut down once in 21 years, and in the year they are cut they produce profit, but in other years they are stated as producing none. At the time of the rate they were of 10 years standing. The sessions thought them not rateable, and therefore quashed the rate; but submitted the question to this court, Whether they were liable to be rated every year, according to the annual average value thereof; or whether they should be rated *then* only when they are cut down and produce actual profit? Among the several descriptions of persons whom the statute 43 *Eliz. c.* 2 makes rateable, the occupier of *saleable underwoods* is one: and the question is, Whether they can be deemed *saleable* underwoods, except in the year in which they are cut down? The word *saleable* has not a very precise definite meaning: it may mean when they are in a fit state for sale, referring to the time when they are cut; or it may mean such as are intended or destined for sale, in contradistinction to such as are to supply the land with estovers for fuel and the other purposes of the estate. In the former of these cases they would only be rateable in the year in which they are cut: in the latter they would be rateable at all times: and we think, after full consideration of the subject, that the latter is the proper meaning. If they are rateable at all times, they will contribute according to their value, in exact proportion with the rest of the property in the parish: but if they are rateable in that year only in which they are cut, the sum they will have to contribute may materially vary, according to the proportion their value bears in that year to the rateable property of the rest of the parish, and may be much greater or much less than the aggregate sum it would pay if it were rateable at all times. Suppose the underwoods in the year they are cut would produce a clear 1000*l.*; that the sum to be raised in the parish communibus annis is 100*l.*; and that the annual value of the rest of the property in the parish is 980*l.*: if the underwoods be rated at 20*l.* a year, which may be the rent they would produce upon a 21 years lease, the rates would amount to 2*s.* in the pound, and the underwoods would contribute annually 40*s.* If they were rated only in the year they were cut, a shilling rate would then be sufficient, and they would contribute rather more than 50*l.* So far there would be no injustice. But suppose the rest of the parish to be worth 10,000*l.*, the underwoods would, supposing them as before to be rated at 20*l.* contribute annually about

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about 4*s.*; *whereas if rated in the year of cutting, they would contribute in the proportion which 1000*l.* bears to 10,000*l.* that is the 11th part of the whole rate of 100*l.* which in money is 9*l.* and a fraction. As 50*l.* then is only 25 times 40*s.* and 9*l.* is 45 times 4*s.*, the disproportion in the two cases put is obvious, and the difference to all parties, whether the rating be annual, or in the cutting year only, considerable. Again, suppose the annual value of the parish 6000*l.*, and the annual sum to be raised still 100*l.*, the rates will be 4*d.* in the pound, and the underwoods will pay annually 6*s.* 8*d.* upon their same supposed annual value of 20*l.* whereas if they paid in the cutting year only, they would pay 14*l.* 5*s.* 8*d.* which is above 42 times 6*s.* 8*d.* Put the annual value of the parish at 500*l.*; the rates to raise 100*l.* must be 4*s.* in the pound; but in the cutting year they would only be 1*s.* 4*d.* The underwoods would contribute in ordinary years, upon the last mentioned assumption of the annual value of the rateable property in the parish, 4*l.* annually; whereas in the cutting year they would contribute little less than 20 times that sum, viz. 75*l.* It is hardly necessary to state that a mode of rating which might produce such differences to the owner of this description of property, and to the parish, if he contributed only in the cutting year, cannot be the true rule; and the only other rule is a constant contribution, which will at all times fall equally upon this and every other species of property. The objection to this, in argument, is, that the property ought not to be rated until the produce of it has been severed from the land, and until it has supplied the occupier with the means of paying. But we are of opinion that it is not necessary that any of the profits should have been actually reaped or taken from the property during the period for which the rate is made; but that the property is at all times rateable according to the improvement in its value, or in the rent which might fairly be expected from it. Instances continually occur in which the occupier is rated, though he has derived no profit during the period for which the rate is made. A new tenant upon an arable farm reaps none of the produce till the autumn after his tenancy commenced, and yet he must pay up to that autumn according to the rent or value of the estate. He must pay beforehand for the future probable produce. His farm is constantly in a progressive state towards producing profit, and he pays for that progress. So underwoods are annually improving in value, and the rates the occupier pays are for that improvement. This may possibly be hard upon tenants for life; but if the law have thrown this burthen upon the property, they take

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take it with that burthen. We think, for the reasons we have mentioned, that the law has so thrown it; that the property is at all times liable to be rated whenever rates are made; and consequently that the order of sessions ought to be quashed, and the rate confirmed.

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Wednesday, July 6th.

*ROBINSON *against* LEWIS.

Where notice of pulling down and rebuilding a party-wall was given under the building act 14 *Geo.* 3. *c.* 78., and the tenant of the adjoining house, who was under covenant to repair, finding it necessary in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same: held that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance: all the powers and authorities given by the act in respect to any works to be done, being given to the owner of the house intended to be pulled down and rebuilt; and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house.

THE Plaintiff declared in assumpsit for money paid, laid out and expended by him for the defendant's use, and on the other money counts. The defendant pleaded the general issue, and paid 76*l.* 2*s.* into court. And at the trial before Lord *Ellenborough* C. J. at the sittings, a verdict was found for the plaintiff for 194*l.* 14*s.* 2*d.* beyond the money paid into court, subject to the opinion of the Court on the following case. The plaintiff was tenant to the defendant of a freehold messuage in *Little Queen Street, Lincoln's Inn Fields,* and held the same by lease dated the 19th of *February* 1781, from *T. Lewis,* father of the defendant, to one *J. Savage,* for 31 years, at the yearly rent of 36*l.*: in which *Savage* covenanted to repair the premises during the term, with all manner of needful and necessary reparations and amendments whatsoever; (casualties by fire only excepted). The grantor died in 1803, and the reversion descended to the defendant. And *Savage,* on the 12th of *February* 1794, assigned his interest to the plaintiff, who entered, and is now possessed under the said lease. On the 21st of *June* 1804 the plaintiff was served with the following notice, on behalf of the occupier of the adjoining house, which was in a ruinous state, viz. "To the landlord, head owner or occupier, or whom else it may concern, of the †house and premises, situate and being No. 29, *Little Queen Street, Lincoln's Inn Fields:* please to take notice, that I shall sell the materials of the house and premises No. 28, &c. on the 25th *June,* 1804, and the same will be begun to be pulled down on the 26th of *June* 1804: therefore you will please to

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shore

shore up or otherwise secure your premises, that no damage may ensue, to prevent any suit at law or in equity. (Signed) *T. Ellis*, 21st of *June*, 1804." The plaintiff immediately served a copy thereof on the defendant. The adjoining house was agreeable to such notice taken down, and the party-wall being found ruinous, the plaintiff was regularly served with the notices required under the act 14 *Geo.* 3. c. 78., which he from time to time communicated to the defendant: and no notice being taken thereof, four surveyors were regularly appointed under the act, and the party-wall was duly condemned by them as ruinous; and they certified the same under their hands on the 21st of *March* 1805; and that the party-wall ought to be taken down and rebuilt. And this certificate was filed by the clerk of the peace for the county of *Middlesex* on the 22d of *March*, 1805. The plaintiff was regularly served with this condemnation on the date of it; and on the same day sent a copy thereof to the defendant, who declined to take any part in the business, conceiving himself not liable to the expense (*a*). The wall was in consequence pulled down and rebuilt by *T. Wilson*, the then proprietor of the adjoining house, and on the 28th of *December* 1805 the plaintiff was regularly served with the following estimate, accompanied with a demand of payment on pain of legal measures to enforce it.

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Mr. *Geo. Robinson*, *Dr.* to *T. Wilson*.

For the half of the north party-wall and chimneys to his house in *Little Queen Street*.

	£.	s.	d.
5 rods, 75 feet, reduced brick at 14*l.*	73	17	2
19 feet run plaintile creasing at 3*d.* -	0	4	9
6 chimney pots and plaintile flaunches, 7*s.* 6*d.*	2	5	0
19 double loads rubbish carted away, 5*s.* 6*d.*	5	4	5
Paid district surveyor his fee -	1	1	0
	£82	12	5
Contra Cr.			
4 rods old brick work, 50*s.* -	10	0	0
	£72	12	5

Measured *November* 1805. *Edw. Mawley.*

The plaintiff paid *Wilson* 70*l.* 9*s.* 6*d.* to which the bill was

(*a*) The defendant, it was said, was a middleman, whose term had not many years to run.

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reduced by a surveyor, and also 5*l.* 12*s.* 6*d.* for the surveyor's charge: which several sums were regularly ascertained in pursuance of the said act, and which money the defendant has paid into court. Upon the occasion of pulling down the party-wall, it became necessary to shore up the plaintiff's house, and to pull down, rebuild, and reinstate some of the wainscots and partitions therein, which were done by the direction of the plaintiff, and not by *Wilson* or his workmen: and the plaintiff, to avoid being sued by the workmen he had so employed, paid for the same the further sum of 194*l.* 14*s.* 2*d.*, beyond what is paid into court, which were *reasonable charges* of so shoring up the house, and pulling down and reinstating the wainscots and partitions; but the same was never submitted to the surveyors or to any other, nor was any account thereof ever taken by the builder of the said
[230] wall, or left by him at the plaintiff's or defendant's house; but the same were before this action was commenced communicated by the plaintiff to, and demanded of the defendant, with an offer to have them examined; but the defendant, conceiving himself not liable, declined any interference in the business. That the money paid into court is the amount of the reduced estimate to 70*l.* 9*s.* 6*d.*, and the 5*l.* 12*s.* 6*d.* the surveyor's charge, and the verdict is found for the 194*l.* 14*s.* 2*d.* the extra expenses above mentioned. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover the 194*l.* 4*s.* 2*d.* the expenses so paid by him for shoring up the house occupied by him, and pulling down and reinstating the wainscots and partitions? If he were, the verdict was to stand: if not, a verdict was to be entered for the defendant.

The stat. 14 *Geo.* 3. *c.* 78. *s.* 38. provides that every owner of a house who shall think it necessary to pull down and rebuild any party-wall, in case the owner of the adjoining house will not agree touching the same, shall give 3 months' notice in writing to the owner if known, or otherwise to the occupier of such adjoining house, of such his intention, by delivering a copy of such notice, &c. (in which notice is given of the intention of having the party-wall surveyed, naming his surveyors, and the time of attendance, and requiring the other owner to appoint two other surveyors to meet them at the appointed time and place to certify the state and condition of the party-wall, &c.); and that every such owner or occupier of the adjoining house shall appoint two surveyors to meet the other surveyors to view and certify, &c.; or in default of such nomination, the party giving
[231] the notice shall name two other surveyors to meet those named in the

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the notice, who are to meet, view, and certify the same to the justices at the quarter sessions, &c. And if the majority of the surveyors certify that the party-wall ought to be repaired or pulled down, a copy of their certificate is to be delivered to the owner or occupier of the adjoining house, and filed with the clerk of the peace: and an appeal is given to such owner, &c. And if there be no appeal, or the certificate be confirmed on appeal, the party giving the notice may, in 14 days after delivering a copy of such certificate as therein mentioned, pull down and rebuild the party-wall, and enter the adjoining house, and remove the wainscot, furniture, &c., and shore up the house, and rebuild the party-wall, &c. And section 41 directs how the expences of the party so rebuilding are to be reimbursed by the owner of the adjoining house: and particularly that the owner or occupier of the adjoining house shall, together with a proportional part of the expence of building the party-wall, "also pay "a proportional part of all other expences which shall be neces- "sary to the pulling down the old party-wall, &c.; and the "whole of all the reasonable expences of shoring up such ad- "joining house, and of removing any goods, furniture, or other "things, and of pulling down any wainscot or partition, and "also all costs, if any, awarded by the sessions," &c. It then directs, that within ten days, &c. after such party-wall shall be so built, such first builder shall leave at such adjoining house a true account in writing of so much thereof for which the owner of such adjoining house shall be liable to pay, and also an account of such other expences and costs; "whereupon it shall be "lawful for the tenant or occupier of such adjoining building to [232] "pay such proportional part as aforesaid to such first builder, "*and also for shoring* such adjoining building, and for all such "other expences as are herein before directed to be paid by the "owner of such adjoining building, and to deduct the same out "of his rent, &c., until he shall be reimbursed." And if the expences be not paid within 21 days after demand, a remedy is given against the owner by action of debt, or on the case.

The case was argued in last *Michaelmas* term by *Holroyd* for the plaintiff, and *Wigley* for the defendant; when it was insisted for the defendant, that the tenant, being bound by his covenant to make all repairs, could recover nothing against his landlord, except that which he had been compelled to pay under the express provisions of the act above mentioned; and that the course there pointed out not having been pursued here, but the plaintiff having

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ing voluntarily incurred the expences sought to be recovered, he had no remedy over against his landlord.

On the other hand, it was contended for the plaintiff, that as he would have been protected by the act in paying to the first builder the expences of shoring up and pulling down and reinstating the wainscot and partitions, which are found to have been necessarily incurred, if the same had been first paid, and afterwards demanded, by such first builder of him, the tenant; it could not make any difference as to his remedy over against his landlord, that he had paid these expences himself in the first instance. That the inconvenience to a lessee would be very great if he were obliged to entrust the workmen employed by the [233] owner of the next house, to enter his premises and remove all his furniture and stock in trade, instead of having it done by persons employed by himself, when the necessity of doing it at all was imposed upon him by the regulations of the act. That the act only meant to give the power of doing these things to the owner of the house meant to be repaired, where the owner or tenant of the adjoining house would not take it upon himself: That all the expences necessarily attendant upon the pulling down and replacing the party-wall, such as the removing and replacing of the wainscot and partitions, were also intended to be thrown on the landlord. As in *Hyde* v. *Cogan* and others (*a*), the hundred was held liable for furniture destroyed by rioters in pulling down a house, as well as for the damage done to the house itself, though the latter only is named in the statute 1 *Geo.* 1. *st.* 2. *c.* 5. *s.* 6. And upon the construction of the building act, the cases of *Southall* v. *Leadbeater* (*b*), *Beardmore* v. *Fox* (*c*), *Barrett* v. *The Duke of Bedford* (*d*), and *Sangster* v. *Birkhead* (*e*), were referred to: and it was insisted, upon the authority of the latter, that the operation of the statute was not varied by a covenant for repairs on the part of the tenant. The case stood over for consideration till this term, when

Lord ELLENBOROUGH C. J. delivered judgment. The money sought to be recovered in this action is the expence of shoring up the plaintiff's house, which work was done by a workman employed by the plaintiff for that purpose, and the money paid by the plaintiff to such workman. This is an expence which pro- [234] perly belonged to the plaintiff, except so far as the stat. 14. *G.* 3.

(*a*) *Dougl.* 699. (*b*) 3 *Term Rep.* 458. (*c*) 8 *Term Rep.* 214.
(*d*) *Ib.* 602. (*e*) 1 *Bos. & Pull.* 303.

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c. 78. has shifted the burthen; because the plaintiff was tenant under covenant by the terms of his lease to repair uphold and support the demised premises; and the defendant, the landlord, is no further or otherwise liable to this expence than as the act of parliament has made him so: the rule and manner of his liability must therefore be found in the act. Now the act empowers the person at whose expense a party-wall is rebuilt, in other words the owner of the house adjoining to his, pursuing the directions and giving the notices pointed out therein, to shore up the house and build the party-wall; and after the expense has been ascertained by surveyors in the manner pointed out by the act, to leave a true account in writing at the adjoining house: whereupon the act directs that it shall be lawful for the tenant or occupier of the adjoining building or ground to pay one third, or such proportional part of building the wall as aforesaid, and also for shoring and supporting such adjoining building, and such other expenses as are directed to be paid by the owner, and to deduct the same out of the rent which shall become due from him to such owner under whom he holds the same, until he shall be reimbursed: and in case the same be not paid within 21 days next after demand thereof, then that the same may be recovered with full costs of suit of such owner, by action of debt or on the case. All the powers and authorities given by this act, in respect to any works to be done, are given to the owner of the house intended to be pulled down and rebuilt, and the money is to be paid by him; and it is only in the event of the money for doing such works having been paid to him by the tenant, that such tenant can reimburse himself as against his landlord. This being [235] therefore an expence incurred by the tenant by his own act, and not in pursuance of the provisions of the statute, cannot be recovered against the defendant, his landlord.

His Lordship added, that Mr. Justice *Lawrence*, who sat in this Court when the case was argued, concurred in this opinion.

Postea to the defendant.

The

1808.

Wednesday, July 6th.

The KING *against* LUCAS and Another.

One who has a primâ facie title to a copyhold is entitled to inspect the court-rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time.

DAMPIER obtained a rule calling upon the lord and the steward of the several manors of *Filby* in *Norfolk* to shew cause why a mandamus should not issue, commanding them to permit Mr. *Searle*, who claimed certain copyhold lands within these manors, to inspect the Court rolls and to take copies thereof. This was obtained upon an affidavit setting forth Mr. *Searle*'s claim as grandson and heir at law of the copyholder last seised, who died in 1774, having first devised certain estates for life and in tail, which were spent, with remainder to his daughter *Mary* in fee, whose eldest son the present claimant was: and which affidavit also stated that application had been made to the lord and his steward for leave to make the required inspection, which they had refused.

Park shewed cause on behalf of the lord, whose father had purchased the premises, of which he had been in possession for some years, and objected to the right of the claimant to inspect the rolls, there being no cause depending in which the title was involved: for which he cited *The King* v. *Allgood (a)*, where a similar application was denied on that ground.

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Lord ELLENBOROUGH C. J. I do not know why there should be any cause depending in order to found an application of this sort. This is not the impertinent intrusion of a stranger; but the application of one who is clearly entitled to the copyhold, unless there be some conveyance of it by those under whom he claims: he may therefore well require to see whether there appears upon the rolls to be any such conveyance.

The Court thereupon made the rule absolute, so far as related to the copyhold lands claimed.

1808.

Wednesday 6th July.

BLEWITT *against* MARSDEN.

Where a sham plea was pleaded of judgments recovered in the court of Piepoudre in *Bartholomew* Fair, in terms palpably fictitious and out of the regular course the Court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings.

TO an action against the acceptor of a bill of exchange the defendant pleaded a sham plea of judgments recovered in the Court of Piepoudre in *Bartholomew* fair, which were framed in terms obviously denoting fictitious proceedings; and *Park* for the plaintiff in consequence applied for a rule to shew cause why the plaintiff should not be at liberty to sign interlocutory judgment in this case as for want of a plea (treating it as a nullity; it being palpably and upon the face of it a sham plea,) and why the defendant's attorney should not pay the costs occasioned by the plea and of this motion. And on cause shewn by the *Attorney-General*, he did not attempt to justify what had been done, but endeavoured to excuse the pleader and the defendant's attorney, upon the ground of their having been misled by an improper practice which had crept in of putting such sham pleas upon the files of the Court. He observed that it might be difficult to prevent altogether the practice of putting in sham pleas of judgments recovered in the usual form; and he would not discuss the different merits of the respective forms of pleading them.

The Court said that there might be occasions where they would not enter into any question as to the truth of a plea of judgment recovered pleaded in the usual form, upon motion, but await the time for producing the roll when such a plea would be regularly disproved; but they expressed great indignation against the abuse which had grown up of late and was continually increasing, of loading and degrading the rolls of the Court with sham pleas of this nonsensical nature, making them the vehicles of indecorous jesting; by which it sometimes happened that the time of the Court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points which might arise on demurrer to such sham pleas. And therefore in order effectually to put a stop to this practice in future, they made the rules absolute in this and several other causes wherein the same form of plea had been filed.

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END OF TRINITY TERM.

MEMORANDA.

Mr. Serjeant *Heywood* was made a *Welsh* Judge in *March* 1807. And in *Hilary* term last *John Balguy* Esq. of the Middle Temple received a similar appointment. And in the course of the long vacation, after this term, *Nathaniel Goodwin Clarke* Esq. of *Lincoln's Inn* was appointed one of his Majesty's counsel learned in the law, and took his seat within the bar in the ensuing term.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

In the Forty-ninth Year of the Reign of GEORGE III.

1808.

JOHN LANE and ANNA LOUISA his Wife and ELIZABETH HOWORTH, Widow, *against* WALTER WILKINS, HENRY ALLEN, THO. DAVIES, MORGAN WALTERS, Clerk, and FRANCES his Wife, RICHARD NORMAN, and MARY-ANN his Wife, JANE HOWORTH GRAHAM, an Infant, (by Guardian,) and WILLIAM HOWORTH DAVIES, an Infant, (by Guardian.)

THE Lord Chancellor sent this case for the opinion of the Judges of this Court.

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*On the 26th of *November* 1773, the Rev. Dr. *Griffiths*, being seised in fee of messuages and lands in *Radnorshire*, by his will duly executed and attested, devised the same to trustees for 500 years

A., having no issue, and being tenant in tail under the will of Dr. *G.*, with remainder to *B.* and *C.* for life, remainder to the heirs of their bodies for such estates and in such proportions as they or the survivor should appoint, and in default of such appointment, remainder to the heirs of the body of *B.*, with remainders over; made his will, whereby, after devising certain estates to trustees to sell and apply the purchase-money amongst different relations, and directing them to sell *all* other his real estates, and apply the money to some of those relations; he gave 5*l.* a-piece to *C.* (who survived *B.*) and to *D.* the only child of *B.* and *C.*, "in consideration of the ample provision

"made

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LANE *against* WILKINS.

years upon the trusts therein mentioned; and subject thereto he devised the said estates to his cousin *John Howorth* for life; and after his decease to the heirs of the body of *John Howorth*; and for default of such issue, then subject as aforesaid, to *Edward Howorth*, and his wife, the plaintiff *Elizabeth Howorth*, whose maiden name was *Lane*, for their lives and the life of the survivor; and after their deceases, subject as aforesaid, to the use of the heirs of the body of *Edw. Howorth* and his wife, for such estates, and in such parts, shares, and proportions, and subject to such charges and limitations, as *Edw. Howorth* and his wife, by deed or writing, duly executed in the presence of three witnesses, should appoint; and in default thereof, as the survivor of them (*Edw. Howorth* and his wife) by will or any other deed or writing, to be in like manner duly attested, should appoint; and in
[243] default of such appointment, to the use of the heirs of the body of *Edw. Howorth;* and for default of such issue, to the right heirs of *Edw. Howorth.* Dr. *Griffiths* died in 1774; on whose death the devisee, *John Howorth*, entered upon the devised premises, and continued seised thereof until his death. The devisee, *Edw. Howorth*, died in the lifetime of *John Howorth*, and without having joined with his wife in making any appointment pursuant to the will of Dr. *Griffiths;* leaving the plaintiff, *Elizabeth*, his widow, and four children by her, viz. *Edward*, *Douglas*, and *Emma*, (all since deceased without issue), and the plaintiff

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" made for them after my decease by Dr. *G* who has by his will devised to them certain estates " in *R.*, now in my possession, which, though I could now legally dispose of, I mean fully to " *confirm* to them, according to the intent of the said will." After this *A.* suffered a recovery, and declared the uses to himself for life, remainder to such persons and for such uses as he by deed, will, or codicil, to be properly attested, should appoint; and for default of such appointment, to *C.* for life, remainder to *D.* for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he *confirmed* his said will in all respects not thereby altered; and after making some alterations in respect of other property, he declared such codicil to be part of his said will.

Held that *C.* and *D.* took nothing under the will and codicil of *A.* in the property which had belonged to Dr. *G.*: for it did not appear that *A.* intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of Dr. *G.*: and his confirmation of his will by his codicil could not carry it further.

But even if he had intended to exercise a devising power by the will, according to the estates carved out by Dr. *G's* will for *C.* and *D.*, yet he afterwards altered that intent, and took a new estate in the premises by suffering a recovery, the uses of which were different from those of Dr. *G.'s* will; reserving to himself a power of appointment by deed, will, or codicil; and when he executed a codicil afterwards, confirming his will in all respects except where altered, or revoked by his codicil, and then making specific alterations as to other parts of his property, without reference to his power or to the property in question (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party meant to execute it) nothing appeared to shew that he meant to execute the power by his codocil confirming his will generally, supposing it could take effect through the medium of such a will.

Anna

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LANE *against* WILKINS.

Anna Louisa Lane. On the 19th of *November*, 1800, after the death of *Edw. Howorth*, and his first three named children, *John Howorth* made his will, duly executed and attested, beginning, " This the last will of me *John Howorth*, of *Hay*," &c. and he thereby devised to *W. Wilkins* and *H. Allen*, and to the survivor and his heirs, his messuage, farm, and lands, &c. called *Lumpadery*, in the parish of *Lowes* in the county of *Radnor;* and also his dwelling house in *Hay*, &c. (describing particular parcels) habendum to the trustees in trust, after his decease, to sell and dispose of the premises, and lay out the purchase-money, viz. the first 1000*l.* of it, in real or government security, and apply the interest half-yearly, for the use and benefit of his sister *Frances Davies*, during her life, and in the meantime out of the rents and profits of the devised estates, (which he charged with the same) to pay his sister 20*l.* half-yearly, &c. and he directed the remainder of the rents and profits to be divided and paid by his trustees amongst his nephew, *Tho. Davies*, and his nieces, *Frances* the wife of the Rev. *Morgan Walters*, and *Mary Ann* the wife of Captain *Richard Norman*, 1-4th to each, and the other fourth to his nephew *Wm. Davies* and *Mary* his [244] wife, and their children, in such manner as the trustees should think proper. And as to the surplus sale-money above the 1000*l.* to be laid out for the benefit of some of the above-named and certain other of his relations in certain proportions and for such interests, as were there therein particularly specified. And then reciting that he had contracted with certain persons for the purchase of three dwelling-houses in the town of *Hay*, with an orchard, &c. and was to complete the same on the 2d of *February* next, on having a good title made thereto; he willed that in case the purchase should be completed during his life, the premises so contracted for should be sold by his trustees; and he thereby directed them to sell and dispose of the same *and all other his real estates*, in such manner and at such time as he had therein before directed for the sale of his estates mentioned in the former part of his will, and *to pay and apply the money arising from the sale thereof to and amongst his said several nephews and nieces*, (children of his sister *Frances Davies*), in such proportions and in such manner to all intents and purposes as he had therein before directed in respect of the money to arise from the sale of the premises first therein devised. And as to his personal estate, after payment of his debts and funeral expenses, he bequeathed as follows, viz. " I give to the widow of my late brother *Edwd. Ho-* " *worth*, and to her daughter Mrs. *Louisa Lane*, 5*l.* each: *and I*

" *give*

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"*give them these small sums only, in consideration of the ample* "*provision made for them after my decease by the late Dr.* Tho- "mas Griffiths, *who has by his will devised to them certain estates* "*in the county of* Radnor, *now in my possession, and which,* "*though I could now legally dispose of, I mean fully to confirm* "*to them according to the intent of the said will.*" He then gave [245] to his niece, *Frances Walters*, all his silver plate and plated goods, and to his godson *F. Allen*, son of the said *Henry Allen*, 5*l.*; and the rest and residue thereof he gave and bequeathed to the said *W. Wilkins* and *H. Allen*, and the survivor of them, his executors, &c. in trust to be applied by them in like manner as he had before directed as to the produce of his *real estates* when sold, and to go in aid thereof; appointing the said *W. Wilkins* and *H. Allen* his executors. And the will ended thus: "In "witness whereof I have to this my last will and testament set "my hand and seal the 19th day of *November* 1800. *John* "*Howorth.* (L. S.)" (with the signature and attestation of the subscribing witnesses).

By indentures of lease and release of the 20th and 21st of *March* 1801, between *John Howorth* of the first part, *Henry Allen* of the second, and *Walter Wilkins* of the third part; *John Howorth* conveyed and released the premises so devised by the will of Dr. *Griffiths* to the defendant *H. Allen* and his heirs, to enable him to become tenant to the præcipe, in order that a common recovery might be suffered thereof, which should enure to the use of himself *(John Howorth)* for life, with remainder to the use of such persons and for such uses, intents, and purposes, as he, by any deed or by his last will in writing, or by any codicil thereto, to be properly attested, should limit, appoint, give, grant, or dispose of the same; and for want of such limitation, appointment, &c, or disposition, to the use of *Elizabeth Howorth* for life, subject to impeachment of waste, with remainder to the use of the plaintiffs, *John Lane* and *Anna Louisa* his wife, for their lives and the life of the survivor, with remainder to the use of *W. Davies*, *Thomas Davies*, *Frances Walters*, the wife of the Rev. *Morgan Walters*, and *Mary Ann Norman* the wife of *Richard* [246] *Norman*, all therein named, as tenants in common in fee. In pursuance of these deeds a common recovery of the premises was duly suffered in the Court of Great Sessions of the county of *Radnor* at the then Spring Sessions; by the record whereof it appears that the Great Sessions commenced on *Monday* the 23d of *March* 1801, and that the writ of seisin was sued out returnable on *Friday* the 27th of the same month, and that the sheriff returned

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turned the writ accordingly; having by virtue of the same writ caused seisin to be delivered to *Walter Wilkins* on *Thursday* the 26th of the same month.

John Howorth, on the 25th of the same month of *March* 1801, made and published the following codicil to his will, duly executed and attested; "A codicil to be added to, deemed and "taken, as and for part of the last will of me *John Howorth*, of "*Hay*, &c. dated in *November* last past. In the first place I "*confirm* my said last will in all respects, except where the same "shall be altered or revoked by this codicil. Item, I give to "*Wm. Prosser*, son of *Wm.* and *Eliz. Prosser*, of *Hay*, &c. all "that messuage, &c. wherein *Wm. Prosser* the elder doth now "dwell, &c. to hold to the said *Wm. Prosser* the younger, his "heirs, &c. Item, I give unto *Frances*, wife of *Morgan* "*Walters*, of *Hay*, &c. her heirs and assigns, all my household "furniture, plate, &c. for her sole use, &c. In witness whereof "I the said *John Howorth* have to this codicil, *which I declare* "*part of my said will*, set my hand and seal, this 25th of *March* "1801." The testator, *John Howorth*, at the time of making the codicil, had no real estates except the estates mentioned in his will. When *John Howorth* suffered the recovery and made his said codicil, the plaintiffs, *John Lane* and his wife had been married several years without having had issue. *John Howorth* died on the 29th of *March* 1801; and thereupon the plaintiff, [247] *Eliz. Howorth*, entered on the premises, and soon afterwards executed a deed of appointment, conformable to the will of Dr. *Griffiths*, and thereby limited the premises, after her own decease, to the plaintiff *Anna Louisa Lane*, and the heirs of her body; and the plaintiffs, having suffered a recovery of the premises, exhibited their bill in Chancery against the defendants, praying, among other things, to have the title deeds of the premises delivered up to them. And, on the 8th of *May* 1807, the Lord Chancellor ordered this case to be stated, and the following question to be put for the opinion of the Court, viz. Whether the plaintiffs took any and what estate in the premises under the will and codicil of *John Howorth?*

The case was first argued in last *Michaelmas* term, and again in last *Trinity* term; the Court having directed it to stand over, upon an intimation that certain parts of the will, which were not stated in the case as directed by the Lord Chancellor to be sent for the opinion of this Court, had been afterwards added by consent of parties: until it was ascertained that his Lordship upon such new statement of facts, entertained any doubt on which he

was

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was desirous of having the advice of this Court. And Lord *Ellenborough* C. J. said, that the Court did not sit to answer cases which the parties themselves chose to bring before them in this form for their opinion. And that very recently the Court of Common Pleas had refused to hear a case argued before them which had been sent there by agreement between the parties concerned, without the desire of the Lord Chancellor.

Abbott, for the plaintiffs, contended that the plaintiffs took
[248] under the will and codicil of *John Howorth* such estates as they would have taken under the will of Dr. *Tho. Griffiths*, if *J. Howorth* had not suffered a recovery; viz. that the plaintiff *Elizabeth Howorth* took an estate for life, with a power of appointing to the plaintiff *Anna Louisa Lane*, or in default of appointment, that *A. L. Lane* took in tail. Then, after observing upon the dates of the several facts and proceedings relating to or affected by the recovery; as that the will of *J. Howorth* was of the 19th of *November* 1800; the deeds to lead the uses of the recovery, of the 20th and 21st of *March* 1801; the codicil, of the 25th of the same month; that the Great Sessions, in which the recovery was suffered, commenced on the 23d of the same *March;* that the writ of seisin was returnable on the 27th, and the sheriff's return that he had caused seisin to be delivered on the 26th; (which day was not material (*a*);) on which facts the recovery must be taken to be as of the first day of the Great Sessions, according to *Shelly*'s case (*b*), and therefore prior to the codicil: though he observed that the case should have stated the first process, (which was the writ of quod ei deforciat, before the codicil:) he argued the case, First, as if the recovery had been suffered by *John Howorth*, without any declaration of its uses; so as to have given him the fee. Then the case would have stood thus—The testator, *John Howorth*, having obtained, through the bounty of Dr. *Griffiths*, such an estate as enabled him to obtain complete dominion over it by suffering a recovery, which, if he had not suffered, the plaintiffs would take the estate;
[249] being by such recovery seised in fee, makes his will, whereby, after making provision for several other relations, he gives to the plaintiffs, *Elizabeth* and *Anna Louisa*, only 5*l.* each; observing that he does this because " of the ample provision made for " them after my decease by the late Dr. *Griffiths*, who has by

(*a*) *Goodright* v. *Rigby*, 2 *H. Blac.* 46. and 5 *Term Rep.* 177. and vide *Selwyn* v. *Selwyn*, 2 *Burr.* 1131. The writ of seisin is never in fact executed.

(*b*) 1 *Rep.* 93.

" his

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"his will devised to them certain estates in the county of *Radnor* "now in my possession, and which, *though I could now legally* "*dispose of, I mean fully to confirm to them, according to the* "*intent of the said will.*" The effect of that would be a devise to them of the same estates as were devised by Dr. *Griffiths'* will by reference to, and through the medium of, that will. It would then be like the case of *Milford* v. *Smith*, which is thus reported in 1 *Salk.* 225. *A.*, being seised in fee, in consideration of marriage, covenanted to levy a fine to certain uses; but no fine was levied. Then *A.*, reciting this deed, by his will "*devises* and "*confirms* all estates given and granted to his son in marriage, "according to the deed." And the Court on a special verdict, held that the will had reference to the deed, and passed such lands and estates as were intended to be conveyed by the deed and fine. If the word *devise* had been in the will, it could hardly have borne an argument; but by the report of the same case in 4 *Mod.* 131., which professes to give the words of the will, they were "Item, *I do ratify and make good,*" &c.; in 1 *Show.* 350. they are "*ratify and confirm;*" and in *Comb.* 195. the words are, "I do hereby *make good and confirm* the estates granted in "marriage for the use of my son," &c. Here, then, taking the recovery as suffered prior to the codicil, and to the will as speaking from the date of the codicil, the word *confirm*, with reference to Dr. *Griffiths'* will, is equivalent to the word *devise*, and shews the intent of *John Howorth*, the testator, to be, that the plaintiffs should have by his will the same estates and interest as they would have had under the will of Dr. *Griffiths*, supposing no recovery had been suffered: the codicil operating as a republication of the will in respect of every thing not thereby altered. Then, 2dly, The declaration of the particular uses of the recovery will not differ the case from what it would have been if the use had been declared merely to *John Howorth* himself in fee. In fact he was then seised for life only, with a power of appointment by deed, will, or codicil; and in default of such appointment, remainder to *Elizabeth Howorth* for life; remainder to *John Lane* and *Anna Louisa* his wife for their lives and the life of the survivor; with remainders over. And he had by his will devised to these persons the same estates and interests as they would have taken under Dr. *Griffiths'* will. The import then of *John Howorth's* will is this; "Dr. *Griffiths* meant to give you certain lands and for certain interests specified in his will. I have the power of preventing this; and I have already done an act by which, if I do not make a change, you will derive a less interest than Dr. *Griffiths*

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Griffiths meant to give you: but I chuse you should have exactly what he meant to give you; and for that reason I give you only nominal legacies. Take, therefore, such estates and interests as are expressed in Dr. *Griffiths'* will." This would operate as a good execution of his power of appointment: and for this purpose a precise and formal reference to the power is not necessary; as was said by Lord *Thurlow* in *Andrews* v. *Emmot* (*a*), and may be collected from other cases (*b*). 3dly, Considering the case, as it really is, that is the will as having been made prior to the recovery, and the codicil afterwards, the codicil is a republication of the will, and makes the latter speak after the recovery. This is now fully settled, by *Acherley* v. *Vernon* (*c*), *Doe* v. *Davy* (*d*), *Barnes* v. *Crowe* (*e*), and *Pigott* v. *Waller* (*f*). It will be objected, however, that by giving this effect to the codicil, it will be attributing to the words of the will a different meaning from that which they had when the will was made: but if the legal effect of the codicil be to make the will speak from the date of the codicil, the meaning of the words must be taken at that date. The intention of the testator must in the first place be sought for in the words he has used; though it may be admitted that if it elsewhere appear that the ordinary sense of the words does not express the intention, another sense may be given to them. But that must be shown clearly, otherwise the ordinary sense of the words must prevail. It is clear however that the ordinary sense of them is not contrary to the true intention of the testator, who certainly meant these plaintiffs to take the same estates they would have had under Dr. *Griffiths'* will; though he inaccurately states in his will that he had then a legal power of disposing of the property in question; which he had not in him then; though he might acquire that power at any time by suffering a recovery, as he afterwards did. Then the codicil made after the recovery, and *confirming* the will, must be taken to have intentionally adopted the language of the will as applied to the then existing state of things, when he had acquired that power. [*Le Blanc* J. May it not be argued that the testator *John Howorth* did not mean to dispose of this property at all by his will, but meant to leave it to pass as it would do under the will of Dr. *Griffiths*, supposing that he did not bar the entail,

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(*a*) 2 *Bro. Chan. Rep.* 303.

(*b*) Vide *Standen* v. *Standen*, 2 *Ves. jun.* 589. and *Hales* v. *Margerum*, 3 *Ves. jun.* 300.

(*c*) *Com. Rep.* 381. (*d*) *Cowp.* 158.

(*e*) 4 *Bro. Chan. Cas.* 2 and 1 *Ves. jun.* 486. (*f*) 7 *Ves. jun.* 98.

which

which at that time he had not done? There is the difficulty. Suppose he had said in terms, "Though I have the power by suffering a recovery to dispose of this property; yet I do not mean to dispose of it, but shall let it pass to those in remainder under Dr. *Griffiths*' will." Lord *Ellenborough* C. J. Suppose he had only said as to this estate, "I shall leave it to go to the persons to whom Dr. *Griffiths* has devised it."] The words used in the will are stronger, when he says that he "means fully to *confirm* it to them, *according to the intent* of the said will;" for that it is an adoption of the same intent; and a *confirmation* of an estate by one who has power to convey operates as a grant of it. Then when he afterwards *confirmed* his will by the codicil, he had the power which he before supposed himself to have.

Owen, contrà, assuming for the purpose of the argument that the recovery was complete before the date of the codicil, first argued the question how far the codicil was a republication of the will, as to the property in dispute, in which the testator had acquired a new estate subsequent to the will. Down to the case of *Acherley* v. *Vernon* (*a*) the decisions had been uniform, as was said by the Master of the Rolls in *Pigott* v. *Waller* (*b*), that after-purchased lands could not pass without an actual republication of the will: but even in *Acherley* v. *Vernon* the House of Lords did not determine, that every codicil duly executed would republish a will: but, as the Master of the Rolls considered, it is [253] a question of *intention* upon the particular wording of the codicil in each case. The ground the Judges took in *Acherley* v. *Vernon*, as appears from what Lord *Hardwicke* said in *Gibson* v. *Rogers* (*c*), was, that the words of the codicil referring to the words of the will, they were so incorporated together that they necessarily made but one instrument. In *Barnes* v. *Crowe* (*d*) the Lords Commissioners decided on the same ground. It is so stated by the Master of the Rolls in *Pigott* v. *Waller* (*e*): for the first codicil was begun upon the last sheet of the will, and continued to another sheet; and the second codicil duly attested was begun upon the last sheet of the first. And there was this further circumstance, that the will assumed to pass all the estates the testator *might* die seised or possessed of: as it did also in *Acherley* v. *Vernon*. And finally his Honor determined *Pigott* v. *Waller* (which he admitted was not materially different from

(*a*) *Com. Rep.* 381.
(*b*) 7 *Ves. jun.* 118.
(*c*) *Ambl.* 97.
(*d*) 4 *Bro. Ch. Cas.* 2. and 1 *Ves. jun.* 486.
(*e*) 7 *Ves. jun.* 120.

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the present as to the question of republication of the will) on the ground of an apparent intention in the testator by his codicil, directed to be annexed to his will and made part thereof, and referring to and altering it in part, to republish his will. But in *Lady Strathmore* v. *Bowes* (*a*), (which has never been overruled), though Lord *Kenyon* admitted that a codicil, confirming a will of lands in general words, will pass land purchased in the interval; yet he states the question to be, whether it were the intention of the devisor to pass by that codicil any thing more than would have passed by the will itself? and in that case the after-purchased lands were held not to pass, by reason of the word *said* (said lands) in the codicil, which confined it to the [254] same lands before given by the will. Then 2dly, taking the codicil to have been a republication of the will, the question is, whether upon the face of the two instruments there appears to have been any intention in the testator to dispose of this estate which he had not at the time of making the will, or to execute the power of appointment which he had at the time of making the codicil? It is admitted that *John Howorth* when he made his will had no power to dispose of the estate. He appears to have accurately known what property he had; and he makes a distinct disposition of different parts of it. And after directing the sale of certain estates by his trustees, and making a disposition of different sums to different relations, he directs his trustees to sell certain newly purchased houses "and *all other his real estates*" in such manner as he had before directed for the benefit of his nephews and nieces. Then he goes on to state, that with respect to the estates in the county of *Radnor*, then in his possession under the will of Dr. *Griffiths*, "though I could now legally dispose of "them, I mean fully to confirm to them (the devisees in remain-"der under Dr. *Griffiths*' will) according to the intent of the "said will." Then what is this in effect but saying, "I know that I am tenant in tail of these estates, and that I might make them my own by suffering a recovery; and that if I do not suffer a recovery, you, the devisees in remainder under Dr. *Griffiths*' will, will take after me the estates which he has given you. And I hereby shew you that by not making them my own and disposing of them, you the devisees will not succeed to them by any mistake or inadvertence of mine; but because I purposely forbear to suffer a recovery of them and to make any disposition of

(*a*) 7 *Term Rep.* 487.

them

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them; meaning that you shall succeed to them by my permission according to the *intent of his will." This is no *devise* of the property; but a notification that he did not mean then to exercise the power of disposition which he knew he might acquire by suffering a recovery. But the testator afterwards altered his [*255] intention, and did suffer a recovery: and by the deed to lead the uses he actually gives to the plaintiff *Elizabeth Howorth* and *A. L. Lane* mere life estates, being less interests than they would have taken under Dr. *Griffiths'* will; with remainder over in fee to the nephews and nieces. But still looking to the possibility of his again altering his mind, or having issue of his own, the testator reserves to himself, after the limitation of his own life estate, a power of appointment by deed, will, or codicil properly attested. Then taking the codicil to be after the recovery suffered, and to be republication of the will, what more can it do than to bring the words of the will down to its own date, and to declare the intention of the testator as it is to be collected from those words at that period, the same as if it had re-stated the will. The codicil does not affect to express any new intention of the testator respecting this property: it is a simple confirmation of his will in this respect, and consequently a confirmation of his intention at the time of making his will. And there is no case where a codicil republishing a will has been held to give a different sense to the words than what they would have borne at the time of making the will. In *Milford* v. *Smith* (*a*) the will which referred to the deed was only held to pass such lands and for such estates as were intended to be conveyed by the deed and fine: and if the testator's intention appeared to devise those estates, it was matter of indifference whether he named them expressly in the will, or by reference to the deed in which they were included. [256] But here it appears by the will that the testator did not mean to devise these estates, which he had not the power of devising at that time, but to leave them to pass by Dr. *Griffiths'* will; and that intention was defeated by the recovery, which gave him a new estate. But if the effect of the republication of the will be to pass any after-acquired property which is within the words of it, though not within the testator's intention at the time of the will; the only words capable of passing this property are those whereby he directs his trustees to sell and dispose of "*all other* "HIS *real estates*," &c. in the manner before directed, and to

(*a*) *Salk.* 225.

pay

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pay and apply the money arising from the sale amongst the defendants, his nephews and nieces there named. For at the time of executing the codicil these were *his* real estates, though the words were used in the will in a different sense. 3dly, As to the codicil and will being an execution of the power reserved to *John Howorth* by the deed; although it be not necessary that the instrument executing a power should refer expressly to the power; as in *Standen* v. *Standen (a)*, where one devised *all* her estates, and had none other to give but under the power; yet here the same objection applies as before stated: it must appear that the person having the power meant to pass the estate by his own act, and not to leave it to pass by the act of another. The rule was laid down by Lord *Thurlow* in *Andrews* v. *Emmett* (*b*), that "if a man dispose of that over which he has a power, in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. But the doctrine is not carried by any
[257] case further than this." Besides, here the words of the power look to a will or codicil *to be* executed; it is to appoint to the use of any person as he by deed or will, &c. *to be* properly attested, *should* limit or appoint. This could not be intended of a will then actually made, and the disposition of which, if any, was completely at variance with the deed reserving the power. Then supposing the codicil to bring down to its date the words of the will, it could not give a new sense to them, nor to the words of the deed. But it is impossible to impute to the testator an intention to execute this power by his codicil, the utmost operation of which can be to republish the words of the will. For when he made his will, it is clear that he did not mean to alter the disposition of the property made by Dr. *Griffiths*' will: but he afterwards altered his mind, and suffered a recovery, reserving to himself a life-estate with a general power of appointment. Then it must be supposed that he meant by the codicil to set up the will of Dr. *Griffiths* in order to give an estate tail to Mrs. *Lane*, by which he would have defeated his own issue, in case he had any; and by which he would destroy the operation of the recovery and the deed to lead the uses, which he had but just before executed. 4thly, If the will be set up by the codicil, as devising the property according to the limitations of Dr. *Griffiths*' will, the limitation to the plaintiffs will be after an indefinite

(*a*) 2 *Ves. jun.* 589. (*b*) 2 *Bro. Ch. Cas.* 303.

failure

failure of issue of the testator himself, and therefore void: for he cannot be taken to have devised first to himself in tail.

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Abbott, in reply, said, that the reference to Dr. *Griffiths'* will must be taken to be partial and not general, as giving only to the plaintiffs the estates which they would have taken under that will. [Lord *Ellenborough* C. J. What words would you insert in carving out the estates that these several persons would take, to make an effectual republication of the will? You could not make the testator devise to himself.] If the testator had left a son, he would have taken an estate tail, with remainder in tail to the plaintiff *Elizabeth*, &c. [*Bayley* J. Supposing an elder son of the testator had died in the testator's life-time, leaving a son; then that son would not have taken, if you suppose the testator to have devised to his eldest son in tail, remainder to his second and other sons in tail.] In that event it would be necessary, to effectuate the intent, to introduce a remainder in tail to the son of such eldest son. [*Le Blanc* J. The objection to this construction is that it introduces so many distinct limitations which are not to be found in Dr. *Griffiths'* will, to which the testator referred.] If the testator be taken as referring to the whole of Dr. *Griffiths'* will, then such a construction must be put upon it as would be consistent with the whole of his intention, which was that all the issue of the testator himself and their issue should take estates tail in succession before the estate went over: but it may also be taken to refer to such parts only of Dr. *Griffiths'* will as gave estates to the plaintiffs. And in the event none of the difficulties suggested would arise. Then this construction will not make the codicil give a different meaning to the words of the will than the testator intended at the time; for he conceived that he had a power of disposing of the property when he made his will, and therefore, however mistaken in that fact, his intention was the same at both times. [Lord *Ellenborough* C. J. May he not have meant by the words he used,—" I could have defeated Dr. *Griffiths'* will; but I will not, you should take under it as he meant you to take :" without executing any devising power at all?] But then he *confirms* the will, which assumes a devising power. Then it is clear that he did not mean by the will to give this estate to the defendants, by the devise of all other his real estates to the trustees, &c.; because he gives the plaintiffs only 5*l.* each, in consequence of the ample provision made for them by Dr. *Griffiths'* will.

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Lord ELLENBOROUGH C. J. The question will turn very much upon the intention of the testator; we will certify our opinion.

The

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The following certificate was afterwards sent:

This case has been argued before us by counsel: we have considered it, and are of opinion that the plaintiffs did not take any estate in the premises under the said will and codicil of the said *John Howorth*.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
JOHN BAYLEY.

Tuesday, Nov. 8th.

SOANE *against* IRELAND and Others.

An Allegation in a declaration that one was seised of a *manor* of *F.*, and that he and all those whose estate he has in the *said manor* have immemorially appointed a sexton of the parish of *F.*, is sustained by proof of his seisin of a quondam manor, which had ceased to be a legal manor for defect of freehold tenants and existed now only by reputation.

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IN an action for a false return to a mandamus for appointing sexton, the second count stated that *T. S. Champneys* was seised in fee of the manor of *Froome Selwood*, with the appurtenances, and that he and all those whose estate he has, and at the several times hereinafter*mentioned, had in the said manor, with the appurtenances, for the time being, from time immemorial have had, exercised, and enjoyed, and been used and ought of right to have, &c. the privilege and right of appointing a sexton of the parish of *Froome Selwood* when the office was and should be vacant. It then stated the vacancy of the office, at a certain time, and that *T. S. Champneys* duly appointed the plaintiff to it; and that the defendant *Ireland* being then the vicar, and the other defendants the churchwardens of the parish, had notice of such appointment, and ought to have admitted the plaintiff to the office, but had refused to do so; in consequence of which the mandamus issued to them; to which they had returned that the plaintiff was not duly appointed to it in manner and form as stated: and for this false return the action was brought. The evidence at the trial at *Wells* was that *Froome Selwood*, which was once a legal manor, had ceased to be so for some period before the vacancy in question, for want of any freehold tenants: though in all other respects Mr. *Champney*'s right was proved as laid. But for this objection it was urged that the plaintiff ought to be nonsuited; his right to the appointment being laid as appurtenant to his alleged seisin of a manor which had no longer any legal existence: but *Bayley* J. over-ruled the objection, and the plaintiff recovered. And now

Pell Serjt. moved for a new trial, upon the defect of evidence to

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to sustain the allegation of Mr. *Champneys'* seisin of the manor in right of which the prescriptive privilege was claimed. But by

*Lord ELLENBOROUGH C. J. If *Froome Selwood* were once a manor, as it appeared, this prescriptive right would still belong to it, though other manerial rights, such as that of holding courts for want of freehold tenants, might be gone and severed from it. It would still be a manor by reputation for this purpose, which will satisfy the allegation; and it was not necessary to prove it a continuing manor for all purposes.

Per Curiam. Rule refused (*a*).

DENN, on the Demise of BRUNE, Clerk, *against* RAWLINS.

Wednesday, Nov. 9th.

THIS was another ejectment brought to recover other lands upon the same title as was stated in the former case reported, of *Roe d. Brune* v. *Prideaux* (*b*). The defendant claimed under a defective lease made by the last tenant for life under the power there stated; which lease reserved the ancient yearly rent of 1*l.* 18*s.* 6*d.*, and a heriot, or 1*l.* 5*s.* in lieu of it; and this rent had been received by the lessor of the plaintiff, the first tenant in tail under the settlement, from 1795, when the last tenant for life died, up to *Michaelmas* 1805; the rack-rent value of the premises being 30*l.* a year. This ejectment was brought in 1806, and the demise laid after the last receipt of rent, but before the ejectment brought: but no notice to quit of any kind had been given. Wherefore it was *objected at the trial, that the receipt of this ancient reserved rent by the tenant in tail was a recognition of the defendant's holding under a tenancy of some sort; if not as tenant from year to year, at least as tenant at will; and that the tenancy could not be determined, so as to make the defendant a trespasser at the time of the ejectment brought without notice. And the defendant's counsel put his case to the jury on that ground. And *Bayley* J. before whom the cause was tried at the last assizes at *Bodmin*, left the question to the jury

Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession under a void lease granted by tenant for life under a power, the rack-rent value of which was 30*l.* a year, cannot maintain an ejectment, laying his demise, at least, on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice.

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a Vide Sir *Moyle Finch's* case, 6 *Rep.* 64. and *Rex* v. *The Bishop of Chester*, per *Holt* C. J. *Skin.* 661, 2.

(*b*) Ante, 158.

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whether by this receipt of the old rent the lessor did not agree that the defendant should continue in possession until he received some notice to quit, so as to legalize his possession in the mean time, and prevent his being treated as a trespasser at the time of the ejectment brought? the learned judge observing that the demise was laid on the 1st of *January* 1806, which was before the delivery of the declaration; in answer to an argument urged by the counsel for the lessor of the plaintiff, that taking the defendant to be a tenant at will, (which he had denied; contending that there was no tenancy at all subsisting between these parties;) the bringing of the ejectment was a determination of that will. And the jury having found for the defendant,

Lens Serj. now moved for a new trial on the ground that there was no evidence to be left to the jury of any tenancy at all subsisting which it required any notice to determine before the bringing of the ejectment; the receipt of the old conventionary rent of 1*l.* 18*s.* 6*d.* being clearly referrable to the void lease under the power, which had been determined not to be binding on the tenant in tail; and the great disparity between that and the fair
[263] rack rent of 30*l.* furnishing no ground for presuming a contract of any kind between the parties for the defendant to hold as tenant on the terms of the void lease. And he referred to the case of *Right* v. *Bawden* (*a*) as in point; the only difference being, that that was a case of copyhold, but the principle was the same. He further urged the difficulty, that if the receipt of the old rent were to be considered as any evidence of a contract that the defendant should hold as a tenant at all, as the doctrine of modern times had been, that what was formerly a tenancy at will was now to be considered as a tenancy from year to year, it might be contended that he was entitled to the regular notice to quit: but the Court having decided against that in the late case, it seemed to follow that no notice was necessary; because the relation of landlord and tenant did not in fact subsist, and could not be implied from this evidence from the manifest improbability of any contract upon such terms.

LE BLANC J. asked from what time before the ejectment brought it could be said that the defendant became a trespasser? And *Bayley* J. having stated as before mentioned the manner in which the question had been left to the jury, the Court after some hesitation granted a rule to shew cause, &c. But on a subsequent day in the term, *Dampier*, who was also of counsel for the

(*a*) 3 *East*. 460.

plaintiff,

plaintiff, informed the Court that Mr. Serjt. *Lens* and himself had considered more fully of the question, and were satisfied that they could not support the rule, and therefore moved that it might be discharged; which was ordered accordingly.

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Lord Viscount GALLWAY *against* MATHEW and SMITHSON.

Wednesday, Nov. 9th.

The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by expressed previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, tho' it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and tho' the greater part of it were in fact so applied Nor can he recover against the other partner the amount the sum so applied to the payment of the partnership debts against such notice.

THE plaintiff declared on a promissory note made by the defendants and one *Whitehouse* deceased on the 16th of *December* 1805, payable sixty days after date to the plaintiff, or order, for 200*l.* value received; and also on the common money counts. It appeared at the trial before Lord *Ellenborough* at *Westminster* that the defendants and *Whitehouse* were partners in a brewery; and on the 16th of *December* 1805 *Mathew* wrote to the plaintiff, alleging the misconduct of his partner *Smithson*, in consequence of which the creditors of the partnership had insisted on the payment of their demands; that there was a certain sum to pay to the excise in a few days, and no resource but to apply to friends, and therefore requesting of the plaintiff to lend him his acceptance for 200*l.* at two months, for which he would send him the promissory note of the firm payable four days before the plaintiff's acceptance became due. In consequence of this the plaintiff agreed to lend his acceptance, and *Mathew* drew the note in question, which was signed by him for himself and his partners. *Mathew* immediately procured the plaintiff's acceptance to be discounted, and applied 180*l.* of the money to the payment of the partnership debts, reserving the rest for himself. But the note in question not being paid when demanded of the defendants, the plaintiff, after renewing his acceptance to the holder, was ultimately obliged to pay it after *Whitehouse*'s death. And now *Mathew* having let judgment go by default, *Smithson* defended the action on the ground that the plaintiff, *before he took the note in question, had notice of an advertisement then recently published in a newspaper by *Smithson*, wherein he warned all persons not to give

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credit to the defendant *Mathew* on his (*Smithson's*) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. This fact being proved Lord *Ellenborough* C. J. held that the plaintiff could not recover upon the count for money paid to the use of the three partners; the payment not having been in fact made till after the death of *Whitehouse*, nor upon the count on the promissory note, which the plaintiff had been previously warned by the defendant *Smithson* that *Mathew* had no authority from him to draw on their joint account: and therefore directed a nonsuit, which

Topping now moved to set aside on the last-mentioned ground; contending that one partner had authority by law to pledge the credit of his copartners with his own, on the partnership account; and that the plaintiff had advanced the money on their joint account, to which it had afterwards been for the most part applied. And that the declaration of the defendant *Smithson* that he would not be liable for the contracts of his partners on their joint account, could not get rid of his legal responsibility. And that at all events, as the plaintiff's acceptance was discounted, and 180*l.* of it immediately applied to the partnership account, the partners were answerable for that.

LE BLANC J. Can an assumpsit be raised by one man's discharging the debt of another who desires him not to do it upon his credit?

[266] Lord ELLENBOROUGH C. J. The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority: and that implication was rebutted in this instance by the notice given by *Smithson*, who is now sought to be charged, which reached the plaintiff, warning him that *Mathew* had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others: they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others.

Per Curiam, Rule refused.

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DENN, on the Demise of JODDRELL, *against* JOHNSON.

Wednesday, Nov. 9th.

THIS was an ejectment for a copyhold in the county of *Derby*, brought by the lord, on the ground of a supposed forfeiture, by tenant for life, without impeachment of waste, cutting down trees on the copyhold. It appeared at the trial, at *Derby*, that this was a copyhold of inheritance, surrendered in 1777 to the use of the will of * *Wm. Brooks* the then copyholder, who had devised all his freehold and copyhold lands to the defendant and others, in trust to raise money and pay off incumbrances, and when his nephew *D.* should attain 23, then in trust for him for life, without impeachment of waste; remainder to his first and other sons in tail in strict settlement; remainder to the trustees in fee, one of whom was the defendant. And the trees were cut down by *D.* after he was in possession. But it appearing also that there was a custom in the manor for the copyholders to cut trees; though no instances where shewn where this had been done by copyholders tenants for life; *Grose* J. nonsuited the plaintiff.

Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, and devised to *A.* for life without impeachment of waste, with remainders over; though there was no instance in fact of a copyholder for life in the manor cutting timber; yet the right being annexed to the fee and inheritance, the copyholder in fee in carving out his estate may make a tenant for life dispunishable of waste: and at any rate, the lord cannot enter upon the copyholder for life's estate, as for a forfeiture upon his cutting timber; for the injury, if any, is to the remainder-man of the inheritance.

Vaughan Serjt. now moved to set aside the nonsuit; contending that no copyholder for life could cut trees, even with a custom which would only protect copyholders of inheritance: but that here, the only instances proved of the exercise of such a right were by copyholders of inheritance; and therefore the copyholder for life not being within the custom, his cutting timber was a forfeiture of his estate; of which the lord was entitled to take advantage. And he referred to *Mardiner* v. *Elliot* (*a*), as taking the distinction between copyholder for life and copyholder of inheritance in this respect, and negativing the power of the former to cut timber in any case for his own use.

Lord ELLENBOROUGH C. J. There is a mistake in considering this copyholder as tenant for life, with respect to the lord; for the whole inheritance is out of the lord, and the fee, as to him, is in all the several persons †claiming under the surrender to the use of the will of the last copyholder of inheritance: and if the next owner of the fee in remainder do not dispute the act of the tenant for life, it is for this purpose a cutting down by him. The injury, if any, is to the remainder-man: but no injury has

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(*a*) 2 *Term Rep.* 746.

been

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DENN dem. JODDRELL *against* JOHNSON.

been done to the lord, and therefore there can be no forfeiture to him by such an act.

GROSE J. If the remainder-man had cut down the timber, the lord could not have maintained trover for it.

LE BLANC J. agreed.

BAYLEY J. The surrenderor and testator was the owner of the inheritance, and he might have cut the timber. Then he might carve out his estate to the several objects of his bounty in what proportions he pleased; and he might give to him whom he made tenant for life the right of cutting the timber.

Rule refused.

Thursday, Nov. 10th.

The Court will not grant a new trial in a penal action where the verdict has passed for the defendant, on the ground of its being against the evidence.

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BROOK qui tam *against* MIDDLETON.

THE jury having found a verdict for the defendant in an action for usury, *Garrow* moved for a new trial, with respect to one of the counts, as being a verdict against all the evidence: the usury consisting in taking a quarter per cent. upon the loan in the name of commission; the lender having nothing to do for it but to receive the money at the appointed time of repayment. And *the Court* appeared inclined to have granted a rule nisi: but they were not satisfied that they had authority by precedent in a penal action, where a verdict had been found for the defendant, without any alleged misdirection of the Judge in point of law, as in *Wilson* v. *Rastall (a)*, to grant a new trial: and they ordered the matter to stand over, to give them an opportunity of looking into the precedents; Lord *Ellenborough* C. J. saying, that if the Court did not find themselves precluded from entertaining the motion, on the ground of the verdict being against the evidence, they would hear *Garrow* further upon it. and before the Court rose on this day, his Lordship referred to the case of *Fonnereau* v. ——— *(b)*, where the court said that the rule had been laid down for 50 years past, not to grant new trials in actions on penal laws where the verdict was for the defendant. There indeed the doctrine was laid down rather too generally, as the Court would certainly grant a new trial in case

(a) 4 *Term Rep.* 753.

(b) 3 *Wils.* 59. The defendant's name was *Bennet.*

of

of the misdirection of the Judge in point of law: but in case of a verdict against evidence, the rule was now settled that no new trial would be granted; which was sufficient to dispose of the present motion: and therefore they refused the rule.

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BROOK *against* MIDDLETON.

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WILLIAMS and Others *against* POWELL, Clerk.

Thursday, Nov. 10th.

THE late vicar of *Abergavenny* made certain compositions with his parishioners for the vicarial tithes, which were payable on the 29th of *September;* and the * *Easter*-offerings were payable on the 10th of *April* in each year; and having received his compositions up to the 29th of *September* 1802, he died on the 10th of *March* 1803. In the *May* following the defendant, the present vicar, was presented, and in *November* following was inducted. The *Easter*-offerings were collected by the sequestrator after *April* 1803, and were paid over by him to the defendant; and after *Michaelmas* in the same year the defendant received the vicarial tithes from some of the parishioners according to the composition of his predecessor, and from others according to new compositions, some more, some less, than the former; in all to the amount of 181*l.* and upwards. The plaintiffs, who were the personal representatives of the late vicar, brought this action for money had and received against the present vicar to recover a proportion of such compositions up to the time of the late vicar's death, amounting as they calculated them, to 68*l.* and upwards. The defendant disputed his liability to account for the compositions which were not due till his own time, but paid 20*l.* into court, in order to cover any small sums which might have been due for tithes or dues which, if received in kind, might have accrued between the 29th of *September* 1802, and the death of his predecessor on the 10th of *March* 1803; which sum it clearly appeared was more than sufficient to cover any such tithes or dues. And *Le Blanc* J. before whom the cause was tried at *Monmouth*, being of opinion that the representatives of the late vicar could have no claim to the *Easter*-offerings due after his death, and that his death put an end to the compositions for the vicarial tithes, at least with respect to his successor; and that the present vicar could not be liable to account for more of the compositions which he had received from the parishioners than the value of the

Compositions for tithes cease on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due after the death of his predecessor he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to; and not pro ratâ, according to the time which had run before his death from the last payment.

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the tithes due, if any vicarial tithes for milk, eggs, &c. might have accrued in that interval, between the 29th of *September* 1802 and the 10th of *March* 1803, when the late vicar died, would amount to; which were more than covered by the money paid into court; directed the jury to find for the defendant; but gave liberty to the plaintiff's counsel to move to set the verdict aside, and enter a verdict for the plaintiffs for the whole or so much of the composition as the Court should think them entitled to recover.

Jervis now moved accordingly to enter a verdict for the plaintiffs for 68*l.* and upwards. He admitted that the compositions ceased in point of law on the death of the former vicar, and that each vicar would, if there had been no compositions, have only been entitled to the tithes accruing due in his own time: but he contended that the present vicar, having adopted the compositions made by his predecessor, and received them as such; and the consideration for such payment being for times, part of which at least had accrued in the time of such predecessor, had thereby charged himself with receiving a proportionable part of the gross sum up to the time of his predecessor's death for his use, and had admitted his liability pro ratâ to the plaintiffs by payment of money into court. And he compared this to the case of *Paget* v. *Gee* (*a*), where tenant in tail having leased, but not according to the statute, and dying without issue between the days of payment; and the remainder-man having received the whole rent; Lord *Hardwicke* held the latter liable to account for a proportion up to the death of tenant in tail. According to
[272] a note of the same case in 1 *Burn's Just.* tit. *Distress*, *s.* 18. which is cited from a MS., Lord *Hardwicke* is made to say, "I ground my opinion in this case upon the tenant's having submitted to pay the rent: he has held himself bound in conscience to pay it for the use and occupation of the land the last half year: he paid it to the defendant, which he was not bound to do in law: and in such a case the person he pays it to shall be accountable, and considered as receiving it for those who are in equity entitled to it." He admitted that the stat. 11 *Geo.* 2. *c.* 19. *s.* 15. did not apply to this case, the demand not being against the occupiers of the land.

Lord ELLENBOROUGH C. J. In the case cited each day's occupation by the tenant was valuable to him, and therefore there might be an equitable apportionment of the rent accruing

(*a*) *Amb.* 198.

from

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from day to day, in respect to such valuable occupation: and the remainder-man who received the whole might well be considered as equitably accountable for the proportion which accrued in the time of the tenant in tail. But here the composition was at an end by the death of the former vicar; and the present vicar in fact received nothing for him; for no tithes had become due since the last payment in *September* beyond what the money paid into court was sufficient to cover.

Per Curiam Rule refused (*a*).

(*a*) An anonymous case in *Bunbury*, 294. was cited at the trial, with the conclusion of which it appears that the learned Judge's opinion did not altogether coincide. "A rector agrees with a parishioner for his tithes for a certain sum, payable yearly at *Michaelmas*. The rector dies the beginning of *September*. The agreement determining by the death of the parson the successor shall be entitled to tithes in kind only from the death: *and the executor of the last incumbent to a proportion according to the agreement till the time of his testator's death; and this by an equitable construction.* Quære the case of *Muly* v. *Webber*, wherein it was so resolved in Scaccario."

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It seems that if the tithes in kind, for which the composition was made, would, supposing there had been no composition, have been wholly due before the death of the rector, his representatives would be legally and equitably entitled to the whole; however they might be restrained by his agreement with the parishioners not to demand payment till the day agreed upon: and the successor could not be entitled to any part of such composition.

Sir WILLIAM CURTIS and Others *against* DANIEL.

Thursday Nov. 10th.

Though the lord of a manor in *Cornwall* may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than 20 years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands, within the vill.

IN trover for copper ore raised from mines upon *Towan*, in the parish of *St. Agnes* in *Cornwall* the plaintiffs claimed on the part of Mr. *Donythorne*, the lord of the manor of *Tywarnehaile Tyas*, within which manor *Towan* lay, though detached from the body of the manor: and it appeared that, besides the manor, the lord had title to the toll of tin; and that he and those under whom he claimed had always in fact received tin dues from mines within *Towan*, as well under the freehold as under the customary lands there, and also under the wastrell or common called *Towan*

Common;

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Common; but no other acts of ownership had been exercised over *Towan* soil by the lord of the manor. The defendant claimed by lease under the respective owners of six ancient tenements in *Towan* vill, five of which were freehold, and the sixth was a customary freehold tenement, held according to the custom of the manor, but not at the will of the lord. And on their part it was proved that for between 20 and 30 years they had made sets of the copper mines, as well under the customary lands and under the wastrell as under the freehold lands; and that these [274] mines had been worked to a considerable extent, and in a manner which was notorious to the whole neighbourhood, to the plaintiff's agents, and to the former proprietors of the plaintiffs' estate. That dues to the amount of above 700*l.* for copper ore raised under the freehold and customary lands, and as much more for dues raised under the wastrell, had from time to time been paid to the tenants, and that the value of the ore raised was ten times the amount of the dues. It was also shewn that stone had been twice taken out of a quarry on the wastrell, which was applied to he repairs of buildings on the customary tenement; and in other nstances earth had been taken by the tenants of some of the six ncient tenements from the wastrell for building a wall and for making manure: and all the six tenants exclusively stocked *Towan* common. It also appeared that the plaintiffs and the former lords of the manor had an agent, who annually collected their tin dues; and that the former lord used to be in the parish about a month every year. At the trial at the last assizes at *Bodmin*, it was at first insisted, on the part of the plaintiffs, that as the lord of the manor had always received tin dues for the tin mines under *Towan*, he was also entitled to the copper mines, even under the freehold tenements: but this claim was finally abandoned. And it was contended, 2dly, that at any rate he was entitled to the copper under the customary tenement, the freehold of the soil being in him. And, 3dly, à fortiori, he was entitled to the copper under the wastrell: and he claimed not merely the dues, but all the copper raised. But *Bayley* J. held, first, that the presumption of law was that all mines under freehold belonged to the freeholder, though in *Cornwall* it might be otherwise as to tin mines, which were governed by peculiar laws and customs. [275] Secondly, that as to the customary lands, the right to the copper mines might be granted to the tenant, and it was to be collected from acts of ownership exercised by him whether it was or not. Thirdly, that though the general presumption of law was that the soil of the waste was in the lord of the manor, yet it might be shewn by

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by evidence of acts of ownership to be in the tenants of the six tenements. That it appeared by admissions entered into between the parties before the trial that the tenants of these six tenements meant to claim the wastrell as their *property*, so that the lord was apprised of the necessity of proving acts of ownership therein on his part; but that all the acts of ownership over the wastrell and the customary lands, as well as over the freehold lands, except in respect of the tin mines, which was governed by a peculiar law and custom, had been exercised by the freehold and customary tenants, who had for between 20 and 30 years past received dues of copper to a very considerable amount openly from time to time in the face of the lord of the manor or his agents, while he had only received his tin dues. And upon this weight of evidence the learned Judge left it to the jury to find for the defendant; which they did.

Moore now moved for a new trial, and contended that the evidence given on part of the defendant did not warrant the verdict of the jury with respect to the copper raised under the customary lands and under the wastrell, (the claims as to the copper raised under the freehold being abandoned) against the general presumption of law in favour of the lord's claim to mines under the customary lands and the wastes within the manor, fortified as it was in this case by the undisputed right of the lord to the tin mines under all the lands of the manor, which was decisive to shew that he was entitled to all other minerals in the soil of which the freehold must be taken to be in him. And he relied upon the case of *The Bishop of Winchester* v. *Knight (a)*, where the freehold of the soil of a customary tenement, though not held ad voluntatem domini, but only secundum consuetudinem manerii, was adjudged to be in the lord, and that he was entitled to copper ore raised by the then tenant and his ancestor out of a new mine. [Lord *Ellenborough* C. J. The tenants here claim the whole soil.] It is said at the conclusion of that report that there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines. That here the taking of copper dues by the tenants was not proved many years back; and it was notorious that no copper mines had been opened in *Cornwall* till within the last century. That with respect to the waste, neither the depasturing by the cattle of the tenants, nor the few instances of taking earth for manure, and stone for building for

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(a) 1 *P. Wms.* 406.

the

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the use of the customary tenant, shewed any right to mines under the soil; while the lord of the manor had at all times past taken tin, which was evidence of his right to all other minerals; and it was not till of late years that the quantity of copper raised was considerable enough to draw attention to it.

BAYLEY J. recapitulated the leading facts given in evidence with respect to the acts of ownership by the tenants in taking copper for between 20 and 30 years past, continually from time to time to a very considerable amount; not less than 7000*l.* worth
[277] of copper having been shewn to be raised during this period from the wastrell; and this in the face of the lord who used to be in the parish every year, and had agents on the spot, and who must have known it. And he stated that he had left it to the jury to determine whether from *these* acts of ownership in working the mines, which were by far the most valuable part of the wastrell the property was in the tenants or in the lord of the manor, who had exercised no act of ownership there, except that of taking tin, which was under a particular title and custom.

Lord ELLENBOROUGH C. J. Why may there not be two customs, one for the lord of the manor to have the tin, and another for these tenements to have the copper under their estates, and the waste in question? The usage which establishes the right of the lord to have the one, will also establish the right of the tenants to have the other. And here has been an adverse possession of these copper mines by these tenants for above 20 years past. Besides, if the lord of the manor thinks he can establish his right to the copper by further evidence upon another trial, there is nothing in this verdict to conclude him. The case was properly left to the jury.

Per Curiam, Rule refused.

DOE, on the Demise of LAWTON, *against* RADCLIFFE.

Friday, Nov. 11th.

THE defendant claimed under a lease made in 1799 by the last tenant for life of the estate under a power to lease for the best rent; and the remainder-man now endeavoured to impeach the lease, which had been granted at a bonâ fide rack-rent of 43*l.* a-year, by evidence that the last tenant for life before he leased had two offers from other tenants, one at 50*l.*, and the other at near 60*l.* a-year, against whose responsibility nothing appeared. But there was contradictory evidence of opinion as to the value, whether 43*l.* a-year were not a fair rent at the time: and *Lawrence* J. before whom the cause was tried at *Stafford*, left the question to the jury under all the circumstances, who found a verdict for the defendant.

Abbott now moved for a new trial, on the ground that this was a verdict against the evidence; the fact not being controverted, that the late tenant for life received the two specific offers of a higher rent at the time of the lease granted from responsible tenants.

The Court however refused the rule; there being no pretence to impeach the lease on the ground that the letting at 43*l* a-year was not done bonâ fide by the tenant for life at the time; he not having taken any fine or other consideration for the lease, and having a manifest interest to get the best rent, which, under all the circumstances, *and due consideration had of the ability and good management of the tenant, could reasonably be obtained. And they said that where the transaction was fair, and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality manifestly shewn by him in favor of the particular lessee, there ought to be something extravagantly wrong in the bargain in order to set it aside on this ground; for in the choice of a tenant there were many things to be regarded besides the mere amount of the rent offered.

Rule refused.

A lease of 43*l.* a-year, granted under a power directing the *best* rent to be reserved, cannot be impeached merely by shewing that the lessor rejected at the time two specific offers, one of 50*l.* and another from 50*l.* to 60*l.* from other tenants; though the responsibility of such other tenants could not be disproved: for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered; unless something extravagantly wrong in the bargain for rent be shewn.

Semble that the *best* rent means the best rack-rent that can *reasonably* be required by a landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account.

Friday, *Nov.* 11*th*.

SPLIDT and Others, Assignees of HOLMES a Bankrupt, *against* BOWLES and Others.

A covenant in a charter party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage: and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party.

BY a charter-party of affreightment, made on the 11th of *February* 1801, *Holmes* of *London*, the then owner of the brig *Eliza*, then on a voyage from *Newcastle* to *London*, let her freight to *Faulder* of *London*, upon a voyage to *Port Mahon* in *Minorca*, with a cargo of coals: and *Faulder* covenanted with the owner, upon condition of his fulfilling all his covenants, to pay freight to the owner or his order at the rate of 51*l*. 5*s*. per keel of 15 *British* chaldrons in *London*, by good bills at 60 days from the receipt of the certificate of delivery, with demurrage at the rate of 5*l*. per day. Soon after the execution of the charter-party the brig arrived from *Newcastle* at *London*, and in *April* 1801, sailed from thence to *Portsmouth*, where she lay waiting for convoy till *August* following, when she proceeded on her voyage, and arrived at *Port Mahon* on the 24th of *October* 1801, and there *delivered her cargo; and in *March* 1802 the certificate of delivery was received by *Faulder* in *London;* and there is due from him for freight 932*l*. 5*s*. and 95*l*. for demurrage. *Holmes*, being considerably indebted to the defendants, in *April* 1801 deposited with them, by way of security, the bills of sale of the brig *Eliza*, and three other vessels; and on the 14th of *September* 1801 the debt due from him to the defendants, amounting to 2760*l*., *Holmes* executed an absolute bill of sale to them of 15-16ths of the said brig; which being then at sea, all the requisites for transferring the property in her from *Holmes* to them were duly complied with, except the indorsement on the certificate of registry required by the stat. 34 *Geo*. 3. *c*. 68. *s*. 15 and 16, which was signed by one of the defendants, by virtue of a power of attorney from *Holmes*, on the 14th of *March* 1803, being within ten days after the return of the brig to *London*, which was on the 6th of the same month: but the ship being, on the said 14th of *September*, upon her voyage to *Port Mahon*, every thing remained in the same state with respect to apparent ownership; and the defendants did not take actual possession until her return to the port of *London*. The said bill of sale of the brig was made of 15-16th parts only, because she was then at

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sea, and to prevent the necessity of a new register. On the same 14th of *September* 1801, *Holmes* by indenture assigned to the defendants the policy of insurance made by him on the brig; and it was by the indenture agreed that such assignment, and also the bill of sale of the *Eliza*, were made for the purpose of securing to the defendants the payment of the said debt of 2760*l.* and interest. And *Holmes* thereby covenanted that in case of default of payment according to the covenants therein mentioned, [281] (which default did take place), the defendants might sell the said brig or shares absolutely, and also the said policy of assurance, and convey or assign the same to the purchaser, and receive the purchase-money, and apply the same to the liquidation of their debt and interest, and of all charges, &c. rendering the overplus, if any, to *Holmes*. On the 21st of *November* 1801 a commission of bankrupt issued against *Holmes*, who was declared a bankrupt, and the plaintiffs were chosen his assignees. After the arrival of the brig *Eliza* the defendants paid several sums for wages due to the seamen, who had threatened to proceed against the brig, and the said debt of 2760*l.* still remains due. This case came on before the Master of the Rolls upon a bill of interpleader filed by *Faulder*, the freighter; when his Honor directed these facts to be stated for the opinion of this Court, upon the question; Whether the defendants or the assignees of *Holmes* were entitled at law to 15-16ths of the said freight and demurrage? And the case stood for argument in the paper of this day, when *Lawes* was to have argued for the plaintiffs, and *Parnther* for the defendants; but when it was called on,

Lord ELLENBOROUGH C. J. said, that if the rights of the parties to receive the freight were to be considered with respect to the charter-party which was stated in the case, no question could be made at law but that the assignees of the bankrupt were entitled to receive it from *Faulder*. For the charter-party was a mere personal contract for the payment of the freight by *Faulder* to the bankrupt, and could not be assigned to the vendees by the transfer of property in the ship. The question sent to us to resolve is, who has the title at law to the freight and demurrage, [282] which are covenanted to be paid by the charter-party; and at law we cannot say that the covenant is transferred to the assignees of the ship by the assignment of the property in the ship, in the same manner as certain covenants are said to run with land. We must therefore certify that the assignees of the bankrupt under the bankrupt laws, and not the assignees of the ship by the bankrupt's

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rupt's own conveyance, are entitled to the freight and demurrage under the charter-party *(a)*.

(*a*) Vide *Chinnery* v. *Blackburne, B. R. E.* 24 *G.* 3. 1 *H. Blac.* 117. n.

Saturday, Nov. 12*th.*

The KING *against* The Inhabitants of BRAMPTON.

Evidence that *British* subjects in a foreign country, being desirous of intermarrying went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into *English* by the officiating clerk; which service the parties understood to be the marriage-service of the Church of *England*, and they received a certificate of the marriage, which was afterwards lost, is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after 11 years cohabitation as man and wife, till the period of the husband's death.

LYDIA, the widow of *Edmund Hudson*, deceased, and their children, were removed by an order of justices from *Brampton*, in *Norfolk*, to *St. Edmund*, in *Norwich;* which order was quashed by the Sessions on appeal, subject to the opinion of this Court on the following case:—

Lydia the pauper, in 1795, accompanied her then husband, a serjeant of dragoons in the *British* army, to *St. Domingo*, where he died. After his death, in 1796, at *Cape St. Nichola Mole*, in the said island, she became acquainted with *Edmund Hudson*, a serjeant in the 26th light dragoons, then serving there: and both parties wishing to *marry each other went to a chapel in the town of *Cape St. Nicola Mole* in order to be married; and there a service was read in the *French* language by a person dressed like a priest, and interpreted into the *English* language by a person officiating as clerk. The pauper *Lydia* did not understand the *French* language, but by the interpreter she understood it was the marriage-service of the established church of *England* read in *French*. She did not know that the person officiating was a priest. She received a certificate of marriage, which she has lost. There was no chaplain at that time with the *British* forces in *St. Domingo*. No evidence was given of the laws or usage respecting the marriage ritual in that island. The said *Edmund* and *Lydia* lived together as man and wife till *May* 1807, when he died; being at the time of his death a settled inhabitant of *St. Edmund, Norwich*. In *January* 1808 the widow was removed.

And such *British* subjects being attached at the time to the *British* army on service in such foreigh country, and having military possession of the place, it seems, that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England*, as a marriage contract per verba de præsenti before the marriage act; marriages beyond sea being excepted out of that act. And it would make no difference if solemnized by a Roman Catholic priest.

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Wilson and *Alderson*, in support of the order of Sessions, after observing that the cohabitation of *Edmund* and *Lydia Hudson* stated in the case, being referable to a marriage in fact there stated, must depend as to its legality, upon the validity of that marriage, contended that the marriage was invalid. 1st, The marriage cannot be supported by the local law of *St. Domingo*, because no evidence was given of that law, by which only it can be ascertained to have been legal there; as was held by Lord *Kenyon* in *Ganer* v. *Lady Lanesborough (a)*, upon a similar question of divorce. And as far as any fact can be noticed out of the case, it is notorious that the established religion of that country is the Roman Catholic; and the evidence, as far it goes, negatives that it was by that ritual. 2dly, It is not a good marriage by the law of *England:* for though marriages beyond the seas are excepted out of the prohibition of the marriage act *(b)*, yet, as before that act in *England*, they must be celebrated by a person in holy orders; and therefore in *Haydon* v. *Gould (c)*, where the parties were Sabbatorians, and the ceremony was performed according to the rites of their sect, and they had lived together for seven years as man and wife, till the death of the latter; yet the officiating minister being a mere layman, the ecclesiastical Court repealed the letters of administration which had been granted to the husband; and the delegates, on appeal, affirmed the sentence. In Mr. *Fielding's* case *(d)*, the marriage was celebrated in his own lodgings by a Roman Catholic priest belonging to the suit of the Imperial Envoy: but here there is no proof that the person who officiated was a priest; it only appears that he was habited like one. [Lord *Ellenborough* C. J. A Roman Catholic priest is so far acknowledged by our church as a person in holy orders, that if he renounce the errors of the church of *Rome*, he is a priest without any new ordination.] There is this singularity also attending the marriage, that though performed in a Roman Catholic country, by a *French* priest in his own language, the service was understood to be performed according to the rite of the church of *England*. This consideration might have weighed with the Sessions in inducing them to discredit, as they have done by their order, the whole transaction.

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The Court here observed that they must assume that the Sessions believed the facts sworn to, which are stated in the case,

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(a) *Peake's N. P. Cas.* 18.
(b) 26 *Geo.* 3. *c.* 33. *s.* 18.
(c) *Salk.* 119.
(d) 5 *St. Tr.* 610.

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otherwise they would not have reserved the question for their opinion.

Peake and *Frere*, contrà, maintained that there was evidence of a good marriage both by the laws of *St. Domingo* and of *England*. As to the first, there is evidence of a ceremony having been performed which the parties meant and understood to be the ceremony of marriage; and it was performed in a public place of worship, and in a public and solemn manner, by a person habited like and believed to be a priest, and officiating as such: these facts therefore raise a presumption that the ceremony was legally performed according to the law of the country, unless the contrary be shewn. But if that were doubtful, 2dly, it was a good marriage by the law of *England* as it stood here before the marriage act, and as it now stands with respect to marriages beyond sea, which are excepted out of that act. In *Haydon* v. *Gould* it was found as a fact that the person who officiated as minister was a layman; and that decision went upon the ground, that as the husband demanded a right in the ecclesiastical court, which was only due to him by the ecclesiastical law, he must prove himself a husband according to that law. But the Court seem to have distinguished his claim from that of the wife or issue entitling themselves by such marriage to a temporal right. And in *Jesson* v. *Collins (a)*, where a prohibition was moved for to stay a suit in the spiritual court upon a contract of marriage per verba de præsenti, upon a suggestion that it was per verba de futuro, the writ was denied; it being a matrimonial question of which that court had jurisdiction: and Lord C. J. *Holt* said, that a contract per verba de præsenti was a marriage; viz. "I marry you:" "you and I are man and wife." And in the report of the same case in 6 *Mod.* 155, he says that such a contract "amounts to an *actual marriage, as if it had been in facie ecclesiæ.*" And in this all the Court agreed. *Dyer* 369, *a.* is to the same effect. In *The King* v. *Fielding (b)* the marriage here by a Roman Catholic priest was held good, on evidence of the words of present contract, which were spoken in English; the rest of the ceremony being read in the Latin tongue, which the witness present did not understand. Though the curtesy of the law of *England* recognizes marriages in a foreign country celebrated according to their law; it does not follow that a marriage between English subjects according to the law of *England* would not be

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(*a*) *Salk*, 437. and 6 *Mod.* 155. (*b*) 5 *St. Tr.* 610.

good

good if celebrated in a foreign country; though not according to their law. Marriages by English subjects have often been made abroad in the chapels of our ambassadors. [Lord *Ellenborough* C. J. If made by the allowance of the foreign state in such places, they would be good marriages in those countries. But if not a good marriage in the place where it is celebrated, it cannot be a good marriage any where.] Still if celebrated openly in that country, the presumption is that it is good there: and the onus of shewing that it is void lies on the party who disputes it. It is at least evidence that it was allowed by the curtesy of the foreign state. Lord *Mansfield* in *The King* v. *Stockland* (*a*) considered the mere cohabitation together as man and wife for 30 years as evidence of a marriage on a question of settlement, and the only [287] exceptions made to the rule in *Morris* v. *Miller* (*b*) were in prosecutions for bigamy (*c*) and in actions for criminal conversation. Upon a late prosecution for bigamy at *Guildford*, before the Lord Chief Baron, where the first marriage was at *Gretna Green* in *Scotland*, his Lordship refused to receive evidence of the law of *Scotland*, in respect to the legality of such marriage from the witness who was a tobacconist.

Lord ELLENBOROUGH C. J. The facts are shortly these: a soldier on service with the *British* army in *St. Domingo*, in 1796 being desirous of marriage with the widow of another soldier who had died there in the service, and both parties being desirous of celebrating their marriage with effect, they went to a chapel in the town where they were, and there the ceremony was performed by a person appearing there as a priest and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk; and which the pauper understood at the time to be the marriage service of the church of *England*. After this they cohabited together as man and wife for 11 years until the death of the husband. And now it is made a question upon these facts, which we must take it the Sessions believed to be true, otherwise they would not have stated them to us for our opinion, whether this were reasonable evidence of a marriage in *St. Domingo* at that time, upon which the Sessions [288]

(*a*) *Burr.* S. C. 509. (*b*) 4 *Burr.* 2059.

(*c*) Vide the report of *Morris* v. *Miller* in 1 *Blac.* 632. where the Court refer to the case of an indictment for bigamy on the *Norfolk* circuit, in which *Denison* J. ruled that "though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shewn." This it seems must be understood where there is primâ facie evidence of a lawful marriage.

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ought to have adjudged the settlement of the wife to be in the husband's parish. First, considering it as a marriage celebrated in a place where the law of *England* prevailed: for I may suppose in the absence of any evidence to the contrary, that the law of *England* ecclesiastical and civil was recognised by subjects of *England* in a place occupied by the King's troops, who would impliedly carry that law with them. It is then to be seen whether this would have been a good marriage here before the marriage act. Now certainly a contract of marriage per verba de præsenti would have bound the parties before that act; and this appears to have been per verba de præsenti, and to have been celebrated by a priest, that is by one who publicly assumed the office of a priest and appeared habited as such; of what persuasion indeed, whether Roman catholic or protestant, does not appear. But even if it were performed by a Roman catholic priest, that would not vary the case; for such a person would be recognized by our church as a priest capable of officiating as such, upon his mere renunciation of the errors of the church of *Rome*, without any new ordination. But the case of *The King* v. *Fielding* is in point to shew that a marriage by a Roman catholic priest (before the marriage act) was effectual for this purpose. That was a marriage in *England* by a Roman catholic priest in the year 1705 before the marriage act; and upon evidence that the prisoner, in answer to the question, whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. *Fielding* for her husband; Mr. Justice *Powel* upon a question of felony considered it as a marriage
[289] contracted per verba de præsenti; in like manner as it was considered by Lord *Holt* in *Jesson* v. *Collins*. And here there is this further circumstance, that the ceremony was performed in a public chapel, instead of in private lodgings, as it was in Mr. *Fielding's* case. Considering the case therefore to be that the King's forces carried with them the law of *England* to *St. Domingo*, by which they and other subjects who accompanied them (in the absence of proof that any other law was in force there) may be considered as continuing to be governed; this would be a good marriage by that law. But supposing the law of *England* not to have been carried to *St. Domingo* by the King's forces, nor obligatory upon them in this particular, let us consider whether the facts stated would not be evidence of a good marriage according to the law of that country, whatever it might be. And indeed after the ceremony of marriage, as it was understood and intended by the

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parties at the time to be, performed openly in a chapel by a person appearing there as a priest authorized to perform the ceremony of marriage; and this followed by a cohabitation between the parties as man and wife for 11 years afterwards; every presumption is to be made in favour of its validity. I should have considered myself as safe in resting my opinion in favour of this marriage upon the law of *England* as it exists independent of the provisions of the marriage act. But without the aid of that I think every presumption must be made in favour of its validity according to the law of the country where it was so celebrated; having been performed there in a proper place, and by a person officiating as one competent to perform that function.

GROSE J. The question is, whether this were a good marriage? And in determining that, I have no objection to consider whether it be a good marriage either according to the law of *England*, or according to the law of the country where it took place. Upon the former ground, I rather think that it was good by the law of *England* for the reasons which have been stated by my Lord. But considered as a marriage by the law of the country where it was celebrated, I think there can be no doubt. The parties meant to be married; they went openly to a chapel in the country where they were; they found there a person appearing as a priest of the country, and they were married by him; the service was performed in French, but it was translated to the parties, and they understood it to be the marriage ceremony. From these facts the presumption would be that it was a marriage according to the law of that country, by a priest of that country cognizant of its laws in that respect, and who it must be presumed would celebrate it according to the law of his own country. There is therefore a fair and reasonable presumption that these parties were regularly and legally married according to the law of *St. Domingo*. I should think the marriage might be sustained according to the law of *England*, but I have no doubt that it is sustainable by the law of the country where it was celebrated. [290]

LE BLANC J. The Sessions have stated to us the facts proved in evidence before them, and they desire to know what is the legal conclusion from that evidence. They state in substance that the parties named, being in *St. Domingo*, and wishing to be married, went in 1796 to a place of worship in that country, and were married by a person appearing there as the priest, and that they have since cohabited as man and wife till his death in 1807. And the question is, whether this be not sufficient evidence that the [291]

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marriage was properly celebrated. It is no objection to it for the woman to say that she did not *know* that the person officiating was a priest: for the same answer would probably be given by most persons who are married here. They must for the most part say that they did not *know* that the person who officiated was a priest; but it would be sufficient evidence of the marriage that the ceremony was performed by a person officiating as a priest in a regular place of marriage. And this answer of hers was no reason for the Sessions to say that the marriage was not performed by a person in holy orders.

BAYLEY J. The facts stated are strong evidence of a marriage; and I cannot presume from any of these facts that the person who officiated was not a priest in holy orders, or indeed that he was a Roman catholic priest. He officiated as a priest in an appropriate place in the country, and married these parties; and after so many years cohabitation as man and wife since that period, I cannot possibly say but that this was evidence of a marriage.

Order of Sessions quashed.

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Saturday, Nov. 12th.

The KING *against* The Inhabitants of the Township of KILLERBY.

Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own, but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish.

WM. Ferguson, his wife, and family, were removed by an order of justices from *Cleatham* or *Killerby*, in the county of *Durham;* and on appeal the order was confirmed at the *Easter* Sessions, subject to the opinion of this Court upon the following case.

George Dent, the master of the pauper, was offered as a witness on the part of the appellants, but was rejected by the Court. Upon the voir dire it appeared that *Dent* had rateable property in *Killerby*, but was in fact not rated for it at the time of hearing the appeal. He was however rated for it at the time of lodging the appeal at the *Christmas* Sessions preceding, but his name was omitted out of the rate made for *Killerby* in the last *Easter* week, for the purpose of rendering him a witness at the hearing of the appeal, at which time the property still belonged to him, though it was in fact rated in the name of his son, who had no interest therein.

Raine was to have argued in support of the decision of the Sessions, that *George Dent* was an incompetent witness; but the Court thought it unnecessary to hear him. And

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Hullock, contra, briefly insisted that only the legal interest of the witness could be regarded: and that he, having been struck out of the rate, was not legally liable to the payment of it.

Lord ELLENBOROUGH C. J. The property rated belonged wholly to the father who was tendered as a witness; the son had no interest in it; and whatever he paid towards the rate must have been allowed again to him by the father. The parties here meant to commit a fraud, but did not know how to do it with effect.

GROSE J. The father's property is still rated, though his name has been fraudently left out of the rate.

LE BLANC J. The witness tendered had property which was rated in the parish, though in another name, that of his son, who had no property there: and this distinguishes it from all the cases where persons having rateable property, which was not in fact rated, were held to be competent witnesses (*a*).

BAYLEY J. assented.

Order of Sessions confirmed.

(*a*) Vide *Rex* v. *Kirdford*, 2 *East*. 559., where all the cases are collected.

HOLLIS and Another, Administrators, &c. *against* SMITH.

Saturday, Nov. 12th.

Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time and being nonsuited, are liable to costs; for the fact of their possession is immaterial; and they may sue in their own right.

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THE plaintiffs sued in trover as administrators, and declared in one count for a loss of goods in the lifetime of the testator, and the trover and conversion after his death by the defendant; and in a second count they declared on their own possession of the goods, and the subsequent trover and conversion. And having been *nonsuited without any evidence, and the Master having disallowed the defendant his costs; *Abbot* obtained a rule for the Master to tax the costs: against which *Wigley* now shewed cause, and relied upon *Cockerhill* v. *Kynaston* (*b*), where the executor declared in one count on a trover and conversion in his testator's lifetime, and in another count on a trover conversion after his death; and the evidence offered, being only applicable to the first count, he was held not liable to pay the costs of a nonsuit. And *Buller* J. there took a distinction, that if the goods never were in the actual possession of the executrix, it was absolutely necessary for her to declare in that character. And here

(*b*) *Trim. Rep*, 277.

no

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no evidence having been given, it did not appear that the goods ever were possessed by the plaintiffs.

Lord ELLENBOROUGH C.J. That opinion was over-ruled in *Bollard* v. *Spencer (a)*. The action is founded upon the plaintiff's property and it is immaterial whether they were in fact possessed of it or not, before the conversion by the defendant. And this latter case was recognized by Lord *Eldon* in *Tattersall* v. *Groote (b)* where, though an administratrix suing on a covenant (*c*) with her testator, was held not liable to costs; yet all the decisions in trover the other way were left untouched by that judgment. It was once endeavoured by Mr. Justice *Buller* to make it the test of an executor's exemption from costs, whether the money, when recovered in the action would be assets: but that is certainly not
[295] the rule now. The question is, Whether it were necessary for the plaintiffs to have declared as administrators? and here it certainly was not necessary; for on the death of their testator they were in point of law the owners of goods which belonged to the intestate; and whether actually possessed by them or not before the conversion, they might declare as any other person upon their own property when wrongfully converted by another.

BAYLEY J. referred to *March* v. *Yellowby*, 2 *Stra.* 1107, assigning the reason why executors shall be liable to costs in these cases, which arises upon the words of the stat. 23 *H.* 8. *c.* 15.

Per Curiam, Rule absolute.

(*a*) 7 *Term Rep.* 358 (*b*) 2 *Bos* and *Pull.* 256.

(*c*) The same answer was given to *Cook* v. *Lucas*, 2 *East*, 395, which was also cited.

Tuesday, Nov. 15th.

RITCHIE *against* ATKINSON.

Where the master and the freighter of a vessel of 400 tons manually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to *St. Petersburgh*, and there load from the freighter's factors a *complete* cargo of hemp and iron, and proceed therewith to *London*, and *deliver the same on being paid freight* for hemp 5*l.* por ton, for iron 5*s.* a ton, &c. one half to be paid on right delivery, the other at 3 months, held that the delivery of a *complete* cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery.

THIS was an action of indebitatus assumpsit for the freight of goods conveyed in the ship *Adelphi*, of which the plaintiff was master, from *St. Petersburgh* to *London*, and delivered to the defendant or his order. There was also a count on a quantum meruit for freight, and the common counts for work and labour, and for money paid, &c. The defendant pleaded the general issue; and at the trial at *Guildhall* before Lord *Ellenborough* C.J. a

verdict

verdict was found for the plaintiff for 960*l.* 15*s.* subject to the opinion of this Court on the following case.

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*The plaintiff being master of the ship *Adelphi*, in *August* 1807 chartered her to the defendant by the following instrument: "Memorandum for charter. *London* 12th *August* 1807. It is this day mutually agreed between Captain *J. Ritchie*, of the ship *Adelphi*, burden 400 tons or thereabouts, now in the river, and *W. Atkinson*, of *London*, merchant, that the said ship, being tight, and every way fitted for the voyage, shall with all convenient speed sail and proceed to *St. Petersburgh*, or so near thereunto as she may safely get, and there load from the factors of *Wm. Atkinson*, a *complete* cargo of clean hemp, and 80 tons of iron for ballast, not exceeding what she can reasonably stow, &c.; and being so loaded shall therewith proceed to *Woolwich* and *London*, and *deliver the same*, on being paid freight for clean hemp 5*l.* per ton, for ballast iron 5*s.* per ton, with two-thirds port charges and pilotage as customary; restraint of princes and rulers during the said voyage always excepted: one-half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in 3 months following. Thirty running days are to be allowed the said merchant, (if the ship is not sooner dispatched,) for loading her at *St. Petersburgh*, and thirty running days for delivery at *Woolwich* and *London*, and ten days on demurrage over and above the said laying days at 6*l.* per day. Penalty for non-performance of this agreement 2000*l.* The ship to sail with convoy from the *Sound* for *England*. *Wm. Atkinson.*" The *Adelphi* sailed in ballast from *Deptford* on the 24th of *August* 1807, and arrived at *Cronstradt*, the port of *St. Petersburgh*, on the 16th of *September* following; where the plaintiff proceeded to take in her cargo under the charter-party, and continued loading her with all due diligence until the 25th of *September*, and had then taken on board between 70 and 80 tons of iron for ballast, the same being a sufficient quantity for ballast, and a considerable quantity of hemp. On the 25th of *September* there was a general rumour of an embargo being intended to be laid by the *Russian* Government on all *British* vessels; and there was every appearance that it would take place immediately; but it did not in fact take place then, nor until six weeks afterwards; but on the 25th of *September* Mr. *Booker*, the agent for the *British* factory at *Cronstadt*, and also the agent to the house of *Hubbard* and Co. the defendant's agents, in consequence of instructions that he had received from Sir *Stephen Shairp*, his Majesty's Consul General at *St. Petersburgh*, desired the captains of several *British* vessels as were ready

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to proceed to sea, to do so as soon as possible, as he expected an embargo might take place immediately. [The case then set out a circular letter of advice to that effect, written to the captains of *British* vessels by the consul's agents.] In consequence of which the plaintiff gave directions to leave off screwing down any more hemp, which is the usual mode of loading, and to fill the ship up as fast as possible by hand; and the whole of this day was occupied in loading the vessel in this manner till 6 o'clock; at which time she was filled up as far as could be done by hand; and the ship sailed on the evening of the 25th of *September* with a cargo more than half what she could have carried, though there was at the time as much hemp of the defendant's lying in lighters alongside of the vessel as would have completely loaded her. The plaintiff acted bonâ fide, and as an honest man under the existing circumstances, and there was a reasonable and well-grounded apprehension for his acting as he did; and he brought home as complete a cargo as he could under the circumstances. Several other vessels sailed the same evening as the *Adelphi*. All or almost all the vessels which had passes sailed either the same evening or the next morning without full cargoes, under the apprehensions of an embargo: but some other *British* vessels did not sail from *Cronstadt* at that time, and were not detained, but completed their loading: and if the *Adelphi* had staid, she might have completed her loading. The plaintiff sailed without any previous communication with *Hubbard* and Co., the defendant's agents, to whom he was addressed; they residing at *St. Petersburgh*. As soon as they had notice of the circumstances they immediately came to *Cronstadt* with an intention to stop the ship, but it was too late; and they then formally protested against him for breach of his charter-party. The *Adelphi* arrived in *London* and delivered her cargo there to the defendant, who refused to pay the freight, as little more than a moity of the quantity of hemp stipulated by the charter-party was brought by the plaintiff. The freight of the iron and hemp so brought to *London* and delivered to the defendant amounted, according to the rate stipulated in the charter-party, to 960*l.* 15*s.* And the verdict for that sum was to stand, if the Court thought that the plaintiff was entitled to recover; otherwise, a nonsuit was to be entered.

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Littledale contended that the plaintiff was entitled to recover freight on the charter-party in proportion to the cargo, although he had not brought home a complete cargo; the delivery of a complete cargo not being a condition precedent, nor the payment stipulated for entire, but to be made at the rate of so much per ton

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ton on the different *articles brought home and delivered, and therefore in its nature apportionable. The words, "*and deliver the same,*" are equivocal, and may mean the cargo actually delivered, as well as the whole quantity stipulated for: and the former is the more reasonable construction, especially in a mercantile instrument; because the plaintiff would then be entitled to receive the just proportion of freight which he had earned: and if by negligence he did not bring home so complete a cargo as he might have done, the defendant would have a remedy against him upon his covenant. The true rule in these cases was laid down by Lord *Mansfield* in *Boone* v. *Eyre* (*a*), that "where mutual covenants go to the whole of the consideration on both sides they are mutual conditions; but where the covenants go only to a part, and where a recompence may be had in damages, it is a different thing:" and this was recognized in *Campbell* v. *Jones* (*b*), and *The Duke of St. Alban's* v. *Shore* (*c*). That doctrine must at all events apply to a case where the amount of the freight was to be ascertained pro ratâ. As in *Tompson* v. *Noel* (*d*), where the master of a ship covenanted to go to *Ireland*, and there take in 280 men from the defendant and carry them to *Jamaica*; and the defendant covenanted to have the 280 men ready, and to pay 5*l.* a man for their conveyance; though the defendant pleaded that he had all the men ready and tendered them to be carried, and the plaintiff only took and carried 180 of them; yet it was held on demurrer to the plea that he might recover, because the plea was only an answer to part of the declaration: that is, though the plea in bar shewed that the plaintiff had not performed the whole of what he had covenanted to do; yet giving no answer to the part which he had performed, he was held entitled to judgment. But, 2dly, though the delivery of a complete cargo were a condition precedent, according to the terms and intent of the contract, yet the defendant having received that part of the cargo which was brought home, the plaintiff is entitled to recover upon a quantum meruit, in respect of the service done, as upon a new cause of action. For though in *Cook* v. *Jennings* (*e*), upon a covenant to pay so much freight for goods delivered at *A.*, it was held that freight could not be recovered upon the covenant, pro ratâ itineris, where the ship was wrecked at *B.* before her arrival at *A.*, though the defendant had accepted the goods at *B.*; yet

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(*a*) *B. R. Easter*, 17 *Geo.* 3. 6 *Term Rep.* 573. and in 1 *H. Blac.* 273. n.
(*b*) 6 *Term Rep.* 573.
(*c*) 1 *H. Blac.* 278.
(*d*) 1 *Lev.* 16, and 1 *Keb.* 100.
(*e*) 7 *Term Rep.* 381.

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Lawrence J. seemed to consider such receipt of the goods by the owner as evidence of a new contract between the parties. And *Luke* v. *Lyde (a)* went upon that principle; as did also *Lutwidge* v. *Grey and others* in *Dom. Proc.* 1733, there cited *(b)*, and the case of the *Copenhagen*, in the Court of Admiralty *(c)*. The case of *Bright* v. *Cowper* (*d*), which seems to bear the other way was an action of covenant, and it does not appear whether the action was brought for the whole or only a proportionable part of the freight. Besides, by the terms of this contract the plaintiff was not bound to deliver the cargo, without receiving payment of half of the freight at the time, and the remainder in three months afterwards: by receiving therefore less than the complete cargo, which the plaintiff was not bound to deliver without a
[301] tender of the half freight, the defendant impliedly agreed to pay for the part so received. [Lord *Ellenborough* C. J. I do not see how the receipt of the goods changes the situation of the parties; because these were the defendant's own goods; and unless freight were due upon them by the contract, the defendant was entitled to have his own goods without any consideration. It was therefore only taking peaceable possession of that, for which, if wrongfully withheld, he might have brought trover. But on the other ground, the plaintiff may contend with strong effect, that the defendant's argument must go this length, that if the cargo wanted a single ton of being a complete cargo, it would be a defence to this action for the freight.] The plaintiff might have gone back again to *St. Petersburgh* for the remainder of the cargo, and was not bound to have delivered a part only of it: and the convenience of receiving the part brought home would be a good consideration to the defendant from whence to imply a new promise to pay for it.

Taddy contrà. The covenant to bring home a complete cargo is a condition precedent to the plaintiff's right to recover freight upon the contract. Is is necessary for the safety of merchants that these charter-parties should be strictly executed; and the late case of *Smith* v. *Wilson* (*e*) proceeded upon that principle, although the freight there was covenanted to be paid at so much per month during the voyage out to *Monte Video* and back again to the port of discharge. The case of *Bright* v. *Cowper (f)* was

(*a*) 2 *Burr.* 882. and 1 *Blac. Rep.* 190.

(*b*) This case is given at length by Mr. *Abbot*, in his *Law of Merchant Ships*, &c. 280.

(*c*) 1 *Rob. Ad. Rep.* 289.

(*d*) 1 *Brownl.* 21.

(*e*) 8 *East*, 437—445.

(*f*) *Brownl.* 21.

there

there relied on by the Court; and it is immaterial whether the action was brought for the whole or a proportion pro ratâ of the freight; for the action of covenant founding in damages, a part only might be recovered, though the plaintiff declared for the whole. And the same argument might have been urged in *Cook* v. *Jennings* (*a*); but the Court held the performance of the whole voyage a condition precedent to the recovery of any part of the freight. There is no difference in this respect between a contract under seal, or by parol. The construction in both cases proceeds on the ground, that if the parties have stipulated for themselves, whether reasonably or not, the Court cannot stipulate for them. The substance of the contract in *Boone* v. *Eyre* was the conveyance of the estate; and the exact number of negroes on it was only the subject of an independant covenant: and any deficiency in the number might be compensated in damages without affecting the title to the estate. In *Campbell* v. *Jones* (*b*), a particular sum was covenanted to be paid on a given day at all events, which might arrive before the instruction covenanted to be given by the other party; and consequently such instruction could not in the nature of the thing be a condition precedent to the payment of the money on the day. *Tompson* v. *Noel* (*c*) seems indeed the other way; but there the covenant applied only to the number of men who were to be carried out at so much per head; which may perhaps make a difference: but a *complete cargo*, which was covenanted in this instance to be brought home, is in its nature an entire thing, depending on the capacity of the ship. [*Grose* J. Does it not depend on the intention of the parties, to be collected from the whole instrument, whether the completion of the cargo was to be a condition precedent to the payment of any freight: and could it have been their intention that if the cargo wanted ever so small a quantity to complete the loading of the ship, that the plaintiff was to receive nothing for that which he brought home?] It may easily be conceived to have been the meaning of the parties, that if the master refused or neglected to take in any part of the cargo, however small, which was ready for him, he should not receive any freight: and that the only effectual way of preventing the omission, whatever the motive might be, was by making the completion of the cargo a condition precedent. Then if so, the acceptance here by the defendant of an incomplete cargo, being his own goods, cannot make any difference. And as to the argument that the plaintiff

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(*a*) 7 *Term Rep.* 381. (*b*) 6 *Term Rep.* 570. (*c*) 1 *Lev.* 16.

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might have gone back to *St. Petersburgh*, and have refused to deliver any part of the cargo till he had completed the whole; the answer is, that he has brought his action before he has so done. Or at any rate he ought to have declared differently, by stating the partial performance of the original contract, and that in consideration that he would deliver the part of the cargo which had been first brought home, the defendant promised to pay freight pro ratâ. But a general indebitatus assumpsit cannot be maintained by a party under contract until the whole duty is performed. [Lord *Ellenborough* C. J. There is a covenant by the plaintiff that the ship shall proceed with all convenient speed to *St. Petersburgh*, and there load a complete cargo; and that would not be satisfied by the plaintiff bringing part of the cargo at one time, and then going back and bringing the remainder of it: and therefore we may lay that, which is not the material part of the case, out of the question, and consider whether the completion of the cargo be a condition precedent.] In *Hadley* v. *Clarke* (*a*), the de-
[304] fendant, having contracted to carry the plaintiff's goods from *Liverpool* to *Leghorn*, was held liable in damages for the non-performance of his contract at the end of two years, during which time the ship was under an embargo of our own government at *Falmouth*, in her way out. And *Lawrence* J. referred to *All.* 27. "that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." As to *Lutwidge* v. *Grey* (*b*), and *Luke* v. *Lyde* (*c*), the master in each had done all that he could, and had forwarded the goods or offered to complete the voyage; but the owner preferred to take them at another place. He then argued the case upon the marine law, as for as it could be collected from local ordinances and general opinions; and referred to 1 *Valin.* 626. 2 *Poth.* 393, 4. 2 *Mag.* 162. 1 *Moll.* 327. and *Mal. Lex Merc.* 98. 190. *Malynes*, in one of these passages, mentions a case of five ships which were freighted out and home in 1587, but from some apprehension of being taken returned without their lading. Two of them having staid out all their time in the foreign ports, and protested against the factors of the freightors from whom they were to have received their lading, were adjudged by the law of admiralty to have deserved their whole freight: but two others who had not staid

(*a*) 8 *Term Rep.* 259. (*b*) *Abbott's Law of Merchant Ships*, 280.
(*c*) 2 *Burr.* 882.

their

their abiding days, nor protested, were found not to have deserved any freight at all, though they were laden outward bound. The fifth ship, under the like circumstances as the two last, had half her freight by a particular proviso in her charter-party. In p. 100. treating on "questions about freightings and their solutions," he says, "If freight be agreed upon for commodities to [305] be laden for a certain price for every pack, &c. without regard to the burthen of the ship, but to give her the *full lading*, no man maketh doubt but that the same is to be performed accordingly." [Lord *Ellenborough*, C. J. No doubt if the master do not bring home a full lading, the other shall recover: but the writer does not say that that is a condition precedent to the claim of freight in proportion to what is actually brought home. In all the cases of conditions precedent the thing to be done is some indivisible thing; but the delivery of a cargo of goods is not one entire thing, but in its nature divisible.

Littledale, in reply, observed on the loose and doubtful opinions of the writers on the marine law, from whence no certain rule could be drawn; though in the very instance quoted, *Pothier* and the others admit that something is to be paid where the master is in no fault. But the intention of these parties, (the material object of inquiry,) that the freight should be paid in proportion to the quantity of the cargo, is manifest from fixing the rate of payment by the ton; for, otherwise, if the cargo had been meant to be one entire thing of a given tonnage, the bringing home of which was to be made a condition precedent to the demand of any freight, one certain sum only would have been stipulated to be paid on the performance of the one entire duty. On the other point: if the expected embargo justified the carrying away the ship till the expectation of danger was removed, the returning afterwards for the remainder of the cargo would be a performance of the voyage *with all convenient speed*. But it has not been thought necessary in this case to argue the question of the embargo, which will arise in another case now standing [306] for argument. As to *Smith* v. *Wilson* (*a*) the owner did not do every thing in his power to earn the freight which he sought to recover, but merely offered to prosecute and complete the voyage, in the progress of which he had been interrupted for a time. That, therefore, was the case of a failure in the very substance of the contract, the performance of which was to entitle the plaintiff to freight. But a covenant to sail with the first fair wind has

(*a*) 8 *East*, 437.

been

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been held (*a*) not to be a condition precedent to the recovery of the freight.

Lord ELLENBOROUGH C. J. If the delivery of a complete cargo were a condition precedent to the recovery of any freight, no doubt the defendant would be entitled to require the strictest performance of it: but the question is, Whether it be a condition precedent? and that depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract: whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other. The rule was well laid down by Lord *Mansfield* in *Boone* v. *Eyre* (*b*), that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of
[307] it; but it is not a condition precedent. That was a case where the plaintiff had conveyed to the defendant a plantation in the *West Indies*, with the negroes on it, and covenanted that he had a good title, and was lawfully possessed of the negroes; and the defendant covenanted, that the plaintiff, well and truly performing all and every thing in the deed contained on his part to be performed, he, the defendant, would pay a certain annuity. And to an action on covenant for non-payment of the annuity the defendant pleaded, that the plaintiff was not at the time legally possessed of the negroes, and so had not a good title to convey. But, on demurrer, Lord *Mansfield* said that if such a plea were to be allowed, if any one negro were not the property of the plaintiff, it would bar the action. He must therefore have considered that such a covenant was in its nature apportionable according to the damage sustained by the breach of it, and did not make a condition precedent to the payment of the annuity. Now apply that to the present case. Here is a ship of about 400 tons, which is freighted to go to *St. Petersburgh*, and to bring home a complete cargo of hemp and iron, and to deliver the same on being paid freight at so much per ton on each commodity. If the owner be not entitled to recover freight for any proportion of goods he may bring home short of a complete cargo, and it should appear by any subsequent admeasurement of the

(*a*) *Constable* v. *Cloberie*, *Palm* 397. *Hall* v. *Cazenove*, 4 *East*, 477, 483, and *Bornmann* v. *Tooke*, 1 *Campbell's N. P. Cas.* 377.

(*b*) 1 *H. Blac.* 273. and 6 *Term Rep.* 573.

vessel,

vessel, even after the delivery of the cargo, that there was wanting some small fraction of a complete cargo; if the ship had been supposed to measure 400 tons, and a cargo adapted to that proportion had been loaded, and it turned out that she measured 10 or 20 tons more; the owner would altogether be defeated of his remedy for the whole freight. But would not such a construction be contrary to common sense and the true nature of such a [308] contract; and can any such meaning be fairly inferred from the terms of it? But it is said that a different construction will bear hard upon the merchant who has stipulated for the delivery of a complete cargo. It does not follow, however, from thence, that if there has been an imperfect delivery, he will be ousted of his remedy: for clearly an action on the case lies against the captain who has made an imperfect, when he could have made a perfect delivery. But I should require the strongest authority to be adduced before I held that this was a condition precedent, when the consequences of such a construction would be such as I have before stated. There is no case, however, where the delivery of less than a complete cargo has been held not to be apportionable. Where, as in *Smith* v. *Wilson* (*a*), the freight is made payable upon an indivisible condition, such as in that case the arrival of the ship with her cargo at her destined port of discharge; such arrival, &c. must be a condition precedent; because it is incapable of being apportioned: but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery. And all the cases of conditions precedent have been where the thing to be done was a strict indivisible condition. The same may be said of the case of the five ships mentioned from *Malynes*, which were freighted out to *Leghorn* and *Civita Vecchia*, there to remain a certain time and take in their lading and return home; and some of them came away without any lading, before the precise [309] time stipulated for their abiding there to be laden had expired. In this case, however, the condition is divisible, and the real justice of the case will be attained by the plaintiff's recovering his freight in the proportion per ton of the goods delivered; and the remedy of the defendant will still be entire to punish the master for his imperfect and wrongful delivery.

GROSE J. It is not a condition precedent to the claim of

(*a*) 8 *East*, 437.

freight

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freight that a complete cargo should be delivered. The agreement, however, does contain a condition precedent in one part; for the payment of the freight is made a condition precedent to the delivery of the cargo; the master being to "deliver the same *on being paid freight.*" This is strong to shew that the parties knew how to make a condition precedent where it was so intended: but they have not done so in the instance now in question. And to construe the delivery of a *complete* cargo to be a conditton precedent to the right to recover any freight would be manifestly unjust; because if default were made in ever so small a proportion of that which would be a complete cargo, the master would not be entitled to any freight for however large a proportion of goods he may have delivered. The reasonable construction therefore is, that the plaintiff should receive freight according to the quantity per ton which he has delivered. But it is said that the intention of the parties was, that the defendant should receive a *complete* cargo, as much as could be stowed in the ship: and that this was a material stipulation to be performed for his benefit. I will not say now that it was not so: but taking it to be so, the defendant has his remedy [310] for the breach of it. If either of the parties break his part of what he has engaged to do, he will be answerable to the other. In this way perfect justice will be done to both: but not so if the delivery of a *complete* cargo were made a condition precedent to the payment of any freight: and therefore I do not think that it was the intention of the parties to make it so. The cases, where acts stipulated to be done by one party have been held to be conditions precedent to the claim of the other, have been where it appeared upon the face of the contract to have been the intention of the parties that the one thing should not be done by one party till something else had been done by the other. But no such intention appears here.

LE BLANC J. The question depends on the construction to be put upon this instrument; whether we can see from the whole of it that it was the intention of the parties that the delivery of a *complete* cargo should be a condition precedent to the recovery of any freight at all. This rule was laid down in one of the early cases, *Kingston* v. *Preston* (*a*), which has been since followed in others. Now the delivery of the cargo was in its nature divisible; for it consisted of hemp and iron, the freight of which was to be paid for by the ton, according to a different rate of payment

(*a*) *E.* 18. *Geo.* 3. stated at length in *Jones* v. *Barkley*, *Dougl.* 689.

for

for the one and for the other: and therefore we cannot collect the intention of the parties to have been to make the delivery of a *complete* cargo a condition precedent to the payment of freight for any part which was delivered. The rule was laid down in *Boone* v. *Eyre*, and approved by this Court in *Campbell* v. *Jones*, and by the Court of Common Pleas in *The Duke of St. Albans* v. *Shore*, that where a covenant goes to the whole of the [311] consideration on both sides, there it is a condition precedent: but where it does not go to the whole, but only to a part, there each party must resort to his separate remedy for the breach of the contract by the other. Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight: because the failure of bringing home one ton less than the full quantity of 400 tons would prevent the plaintiff from recovering for the 399 tons which he might have brought over. The loss on his part by such a construction would bear no sort of proportion to the injury suffered by the defendant. The fair construction therefore is, that the plaintiff should recover freight for what he has performed; and that the defendant should have a remedy against him for that which he has not performed, and which he ought to have done.

BAYLEY J. There would be great injustice done by holding this to be a condition precedent; and none by a different construction; because if the defendant has sustained any injury by the non-delivery of a complete cargo, he will recover a compensation in damages commensurate to such injury. It is necessary to look to the instrument to see whether this be a condition precedent; to see what the intention of the parties was in this respect. It begins by stating that "it is this day *mutually agreed*," &c. That would have some little influence to shew that each of the parties had *mutual* stipulations to make. Not that those words would control the meaning of the subsequent words, if it clearly appeared that a condition precedent was intended by them. Then the captain engages that the ship shall be "tight, &c. and every way fitted for the voyage, and shall with all convenient speed [312] sail and proceed to *St. Petersburgh*." Now if those were to be deemed conditions precedent, then if there were any defect in the fitting out, or an hour's delay in the sailing, the remedy for the freight would be defeated. Could that have been intended by the parties? Then the ship is to return with a *complete* cargo: and if that were a condition precedent, then if there were a deficiency of one ton only in the cargo, though all the rest were delivered, the defendant would have all the benefit of such de-

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livery without being obliged to pay any thing for it. Is that reasonable? and can we collect any such intention from the instrument? In *Cook* v. *Jennings* the freight was to be paid for deals *delivered at* Liverpool: none were delivered at *Liverpool;* and therefore no freight could be due. In *Bright* v. *Cowper* an *entire sum* was to be paid; and therefore unless the plaintiff was entitled to recover the whole, he could not recover any part. Unless therefore there was a performance of the whole for which that entire sum was to be paid, which there was not, he could recover nothing. But there is nothing here to shew that it was the intention of the parties, that the delivery of a *complete* cargo should be a condition precedent to the recovery of any freight actually earned. Great injustice would ensue from holding it to be so; and no injustice to either party from holding it not to be so.

Postea to the Plaintiff.

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Tuesday, Nov. 15th.

Lady Wilson *against* Wigg and another, Executors of Anderson.

To a count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself executors and assigns, may be joined another count, charging them that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one *D. A.* against whom breaches were alleged; and concluding that so neither the testator, nor the defendants after his death, nor *D. A.* since the assignment to him, had kept the said covenant, but had broken the same. And plene administraverunt may be pleaded to both counts.

THE plaintiff declared in covenant upon a lease granted by her and her husband, deceased, to the defendant's testator of certain lands and tithes for 21 years from *Michaelmas* 1787, at a certain rent; whereby the testator covenanted for himself, *his executors, administrators, and assigns,* to perform the covenants in the lease. And by the first count, after stating the above, and that the testator had entered and was possessed of the premises, and made his will, appointing the defendants executors, and died, and that the defendants had proved his will, the plaintiff alleged breaches of covenant by the testator in his lifetime. And by the second count she charged, that after the testator's death, and after the defendants had proved his will, &c. and during the term, all the estate, right, title, interest, and term in the demised premises *came to one* D. Anderson *by Assignment thereof,* by virtue of which he entered and was possessed: and then the

plaintiff

plaintiff charged, that the said *D. Anderson since the assignment made to him as aforesaid*, and his said entry and possession, &c. had not kept the covenant in the said lease, (specifying the breaches in the usual way by such assignee of the term;) concluding, and so the plaintiff saith, that neither the said testator in his lifetime, nor the defendants after his death, nor the said *D. Anderson* since the assignment made to him as aforesaid, have kept the said covenant, but have broken the same, &c.

The defendants pleaded, 1st, performance of the covenant by the testator in his lifetime; and 2dly, plene administraverunt as to the same breaches: and demurred specially to the breaches assigned in the second count to have been committed by *D. Anderson* the assignee of the term, because he was no party to the action; and because the plaintiff could not count in the same declaration against the defendants as *executors* for breaches of covenant committed by the testator in his lifetime, and for other breaches of covenant by the defendants themselves, or by the said *D. A.* as *assignee* of the lease; and that these different breaches of covenant could not be joined in the same declaration; and that the defendants, as executors, were not by law answerable for the acts of *D. A.* as alleged against them for breaches of covenant assigned against the said *D. A.* &c. On which there was joinder in demurrer. [314]

Manley Serj. in support of the demurrer, being asked by the Court what objection there could be to this mode of declaring against executors, answered that the two counts could not properly be joined, because in the first they were sued as executors for breaches of covenant by their testator; and in the second they were sued in effect as assignees of the term after their assignment to *D. Anderson* for breaches committed by him; and it might be very doubtful whether plene administraverunt could be pleaded to the second count.

Lord ELLENBOROUGH C. J. The testator covenants for himself, his executors, and assigns; then are not his funds liable to the plaintiff for any breaches committed by himself, or his executors, or his assigns? *D. Anderson* is an assignee of the testator, and his executors are liable in that character for breaches committed by him: and therefore no doubt that plene administraverunt may be pleaded to the last count as well as to the first. That was settled in the case of *Lyddall and others* v. *Dunlopp and others, Executors of Fenton (a)*. [315]

(a) 1 *Wils.* 4.

Manley

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Manley Serjt. then prayed leave to amend; which was granted conditionally.

Holroyd was to have supported the declaration.

Tuesday, Nov. 15th.

WELLS *against* FYDELL and ELIZABETH BETTS.

It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead plene administravit of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading plene administravit by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any devastavit by the first executor could be made good.

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THE plaintiff sued the defendants as executor and executrix of *John Betts* deceased, which *John Betts* was surviving executor of *John Parish*, deceased, in covenant, upon an indenture of demise dated 19th *March* 1774, whereby *John Parish* demised to one *L. Pape* certain land and buildings for 70 years from the 5th of *April* then next, at a certain rent, and on certain covenants: and declared that by another indenture of the 10th of *June* 1774, *Pape* assigned the residue of the term to the plaintiff. That *Parish* afterwards died during the term, having first duly made and published his will, and thereby appointed the said *John Betts* and one *F. Flowers* executors thereof, who duly proved the same. That *Flowers* afterwards died, while the plaintiff was so possessed of the *term; whereby *John Betts* became surviving executor of *Parish;* and that *John Betts* afterwards, on the 11th of *October* 1803, died, having first made his will whereby he appointed the defendants his executor and executrix, who duly proved his will, &c. The declaration then stated a breach of the covenant for quiet enjoyment by *John Parish* in his lifetime, and since his decease by the defendants as such executor and executrix as aforesaid, in consequence of an eviction of the plaintiff from a certain part of the demised premises by the mayor and burgesses of *Boston* having lawful title thereto.

The defendants pleaded, inter alia, that they have fully administered all and singular the goods and chattels which were of the said *John Parish*, deceased, at the time of his death, and which have ever come to the hands of the defendants as executor and executrix as aforesaid to be administered, to wit, at, &c.; and that they, the defendants, have not, nor on the day of exhibiting the bill of the plaintiff in this behalf, or at any time since, had any goods or chattels which were of the said *John Parish*, deceased, at the time of his death, in the hands of them, the defendants, as executor

executor and executrix as aforesaid, to be administered; and this the defendants, executor and executrix as aforesaid, are ready to verify; wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action thereof against them, &c. To this plea there was a general demurrer and joinder.

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Williams Serj. objected to the sufficiency of the plea, which only put in issue the due administration by these defendants of the assets of the original testator *Parish*, which had come to their hands, as such assets; but did not also allege, as it ought to have done, that their immediate testator, *John Betts*, had fully administered in his own time the assets of his testator *Parish* which had come to his hands; or at least that the defendants had fully administered to *J. B.* their own testator. The frame of the plea would then have been, that the defendants' testator *J. B.* had fully administered all the goods and chattels of his testator *J. Parish* which had come to his hands in his lifetime; and that the defendants had fully administered all the goods and chattels of *J. Parish* which had come to their hands as executor and executrix of *J. B.* since his decease, &c.—or that they had no assets of their testator *J. B.* in their hands to be administered. For it might have happened that the original testator *Parish* had large funds which had been converted into money by his executor *J. Betts*, which he had not administered, and when mixed with his own property could not be distinguished; and such mixed property might have come to the hands of the defendants, his personal representatives, apparently as his own property. But if the plaintiff had taken issue on the plea as it now stands, it would not have been sufficient for him to have shewn that *J. Betts* had assets of *Parish*, and that the defendants had assets of *J. Betts;* unless he could also have shewn that the defendants had assets of *Parish;* which in the case suggested of a mixed fund, it would have been impossible to have distinguished. before the statutes 30 *Car.* 2. *c.* 7. and 4 & 5 *W.* & *M. c.* 24. *s.* 12. If an executor had wasted the goods of his testator, and died, no action would have lain against his personal representative; because the action arising ex maleficio, it died with the person. But since those statutes giving the remedy over, that answer cannot be given to the present objection. The plaintiff does not indeed charge a devastavit by *J. Betts;* nor was it necessary; for if he had, the defendants might still have covered themselves by pleading plene administraverunt to him; according

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ing to the true record of *Skelton* v. *Hawling* (*a*). The only authority which seems to support this plea is the conclusion of the report of *Williams* v. *Keinshame (b)*; where, upon a repleader awarded, the defendant, who was sued as the executor of an executor on a bond made by the first testator, is stated to have pleaded *de novo*, "that he, after the death of both testators, had fully administered all the goods and chattels which were of the first testator at the time of his death, and that he had no goods or chattels which were of the said *first* testator at the time of his death in his hands to be administered on the suing out of the writ or afterwards." But upon consideration of the whole case, it should seem that that was pleaded in addition to the former plea that *the defendant's testator in his lifetime fully administered* all the goods and chattels which were of the first testator at the time of his death, &c.: for the repleader was awarded to correct the error in the subsequent part of the first plea, where he had stated that *he (the defendant)* had no goods or chattels which were of the first testator at the time of his death in his hands to be administered, &c.; when it should have been that *his* (the defendant's) *testator*, (the first executor) had fully administered to his testator, and he, the defendant to his testator. And this is confirmed by the form of pleading in a subsequent case of *Woodward* v. *Chichester*, executor, &c. in the same book (*c*); where to a similar action against the executor of an executor, he did not plead plene administravit generally, but that his testator, the first executor had duly administered: though he omitted to plead further that he had duly administered: for, as was there observed, the answer was not full and perfect. Still it shews, comparing the two cases together, so near in time to each other, what was necessary to constitute a full and perfect answer by an executor of an executor sued for a debt of the original testator.

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Abbott contrà. The estate of the first testator is the only one which is bound in law for the satisfaction of the plaintiff's debt; and therefore if the defendants have never had any part of that estate out of which the debt was to be satisfied, and in respect of which they are charged, that is at least a primâ facie answer to the demand. The wasting of the original testator's assets by the first executor, being a criminal act and offence, is not to be presumed: but if he have been guilty of it, the plaintiff should have brought

(*a*) 1 *Wils.* 258. explained and corrected by the record, as it appears in the note to *Wheatley* v. *Lane*, 1 *Saund.* 219. d.

(*b*) *Dy.* 174. *b.* 175. *a.* (*c*) *Dy.* 185. *b.*

forward

forward the charge specifically by alleging a devastavit in his declaration, as was done in *Skelton* v. *Hawling* (*a*); in order that the defendants might be prepared to refute the charge. If there were any goods of the first testator liable for this debt, they must have come into the hands of the defendants, unless wasted or administered. The plaintiff does not charge that any goods were wasted by the first executor; such as came to his hands must therefore be taken in the instance to have been duly administered. Then the plea of plene administraverunt, covering all the acts of the second executors, is primâ facie a good answer to the declaration. And [320] no greater difficulty is thereby put on the plaintiff than if the defendants had pleaded a full administration both by the first executor and by themselves; for the plaintiff could only have taken issue on one of those facts; and if they meant to rely on a wasting by the first executor, it would have been still open to them to reply to it. If the latter part of the report of *Williams* v. *Keinshame* in *Dyer* (*b*) correctly state the whole of the plea, as it purports to do, that is an authority in point for this form of pleading. The first plea there stated was certainly imperfect, probably from mere mistake; and a repleader was awarded. Then if the new plea stated had been in addition to the first, it is probable that the reporter would have said so. And there is this reason also for supposing it was not, that the plea would otherwise be tautologous; for the defendant had in first instance pleaded that he had no goods or chattels in his hands of the first testator at the time of his death to be administered; and the same allegation is contained in the new plea (*c*). [*Bayley* J. If the plea here had been that the first executor had fully administered, &c. and that since his death his executors had no goods and chattels in their hands of the original testator; would it have been pleading double to have replied that the first executor had not fully administered, nor the defendants since his death, &c.? *Le Blanc* J. Both those facts suggested as proper to have been stated in the plea are necessary to be substantiated in order to give a complete answer to the plaintiff's demand. *Bayley* J. If the replication could [321] not put in issue the whole plea as suggested; then if the first executor had received 100*l.* assets, and had duly applied 50*l.*, and wasted the other 50*l.*; and if the second executor had received 50*l.* assets of the first executor, and had wasted as much;

(*a*) 1 *Wils.* 258 (*b*) *Dy.* 174. *b.* 175. *a.*

(*c*) It was asked by the Court whether the roll had been searched: but it had not: and as no opinion appeared to have been given on the new plea, it was not thought necessary.

then

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then if the plea now pleaded be good, and the plaintiff, having better proof of the wasting by the first executor than by the second, were driven to reply the wasting by the first, then the defendant would cover his own wasting.] If the plaintiff could take issue on both facts, there is no reason why he should not reply the one which was omitted in the plea, and still rely on both. He then referred to the precedent of such a plea as this pleaded, 4thly, in *Lockyer* v. *Coward and another*, executors of an executrix *(a)*, which did not pass without observation, though this point did not arise, but another point upon the replication to that plea.

Williams Serjt., in reply, doubted whether the plaintiff could charge a devastavit by the first executor in his replication to this plea: but contended that at any rate he ought not to be driven to rely on it, as he might not know at the time that the goods had been wasted. But the defendants ought to plead such a plea as will cover all the assets of the original testator, as well those which came to the first executor's hands, as those come to their own; and then as both the facts make only one defence, the replication may well put the whole in issue. As in *Hancocke* v. *Prowd, Administrator* (*b*), where several judgments recovered were pleaded to cover the whole assets; a replication answering each particu-
[322] lar judgment, and concluding the answer to each with a paratus verificare, was held to be rightly pleaded, and not double.

Lord ELLENBOROUGH C. J. In the absence of any precise precedent of the proper form of a plea of plene administravit by the executor of an executor, we must be guided by the rule of reason and common sense. The question is, whether this plea give a fair primâ facie answer to the declaration? for where an executor is charged for a debt of his testator, it is incumbent upon him to give an answer denying having any funds or a sufficiency of funds to answer the debt, otherwise it shall be presumed that he has funds in his hands applicable to the purpose. This is the case of executors of an executor; and if the first executor received assets and did not duly apply them, he would be liable de bonis propriis; and if the second executors received assets of the first testator or of such second testator, and did not duly apply them, then they would be personally liable. Now by this form of plea the defendants purge themselves of any wasting of the goods of the first testator come to their own hands; but as to the administration of the assets by their own testator they say nothing. How then

(*a*) 3 *Wils.* 55. (*b*) 1 *Saund.* 336. *b.*

are

are we to collect whether the first executor well applied the assets of his testator, without any thing said in that respect by the second executors? The plea being silent as to this, if issue were taken upon it, would it not be sufficient for the defendants to prove that they had well applied whatever assets had come to their hands of the first testator; though there might have been funds sufficient come to the hands of the first executor which he had misapplied; and though enough had in fact come to the hands of the second executors of the proper funds of the first executor which would be liable to make good such wasting by him? Then the defendants have by this plea only given an answer to one part of a case which points at two kinds of misapplication of those funds which were liable to the plaintiff's demand: it is therefore an imperfect answer.

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GROSE J. declared himself of the same opinion.

LE BLANC J. This plea does not cover the whole of the declaration. The plaintiff has a claim on *Parish*, for which the defendants are liable if any funds of *Parish* have come to their hands which have not been duly administered, or if their testator *Betts* received and misapplied any of the funds of his testator *Parish*, and the defendants have sufficient assets of *Betts* in their hands. The plaintiff is not cognizant of the affairs either of the first testator, *Parish*, or of the second testator, *Betts;* but he sues the personal representatives of both. The defendants may discharge themselves in two ways; either by shewing that the first executor fully administered all the goods and chattels of *Parish* which came to his hands, and that the defendants since the death of the first executor have duly administered all that they have received of *Parish*'s assets; or they may shew that they have received no assets of the first executor. But as the plea now stands they leave unanswered every thing respecting the assets of the first testator which came to the hands of his executor, and merely answer as to their own application. And in the absence of precedents on which reliance can be had, in respect to the form of such a plea, we must look to the reason of the thing; which requires a full answer to be given in the first instance by those who must be taken to be cognizant of the facts; for otherwise there must be a rejoinder and replication upon matter which ought to have been originally stated by the defendants, and that will be throwing a burthen upon a plaintiff to reply a fact of which he cannot be supposed to be cognizant at the time.

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BAYLEY J. The plaintiff is entitled to recover his debt in either of two events: if the defendants have received assets of the original

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original testator, and have not properly applied them: or if the defendants have received assets of the first executor, and the first executor had received assets of his testator and had not duly applied them. The defendants have only answered as to one of those events; but the plaintiff may be entitled to satisfaction out of both funds; and therefore he is entitled to have the issue so framed that if any thing be forthcoming to him out of either fund, he may be able to avail himself of it. But if we were to hold the present plea to be good, it would work injustice; for the plaintiff would fail, if he could only shew on the trial that the first executor had received assets, and converted them to his own use: and if the plaintiff were driven to reply that the first executor had received and misapplied the assets of his testator, and issue were taken on that fact only, it would exclude the plaintiff from recovering assets of the original testator which had come to the defendants and been misapplied by them: and the inconvenience in the case which I before put in the course of the argument would ensue from this mode of pleading. But the plaintiff is entitled to have the issue so framed as to include both the events on which the defendants' liability arises.

Judgment for the Plaintiff.

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Saturday, Nov. 19th.

The KING *against* The Inhabitants of RUSHULME.

No settlement can be gained by serving under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends; for that is to be taken distributively, *i. e.* reserving a week out of each year.

DANIEL COTTERELL, his wife, and children, were removed by an order of two justices from *Disley* in *Cheshire* to *Rushulme* in *Lancashire*, which order was confirmed by the Sessions, on appeal, upon these facts, which were stated specially for the opinion of this Court. The pauper, *D. Cotterell*, was hired to *John Tonge*, in the township of *Rushulme*, for four years, with liberty to leave a week every year to see his friends, and he served the four years accordingly.

Topping and *J. Williams*, in support of the orders. The hiring here was entire for four years an end, and not four successive hirings for so many successive years; and the only question is, whether the exception, if it be such, will make it a contract for less than a year? No argument can elucidate the case beyond the statement of the question; and accordingly as that is answered in the opinion of the Court, the legal consequence is clear: if it

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The KING *against* The Inhabitants of RUSHULME.

be an exception in the contract, so as to make it at all events a contract for less than a year, no settlement can be gained: if only a dispensation, it may. And with respect to the latter, they observed, that this was only a *liberty to go and see friends* for a week in every year. The pauper was not at liberty to hire himself to any other person; as in *Rex* v. *Bishops' Hatfield* (*a*), to let himself for the harvest month; and in *Rex* v. *Empington* (*b*), to hire himself during the sheep-shearing season. [*Le Blanc* J. referred to *Rex* v. *Over* (*c*), where a pensioner of the *East India* Company hiring himself for a year, with a reservation of two days in each half-year for him to go and receive his pension, was held not to gain a settlement by service under such a contract.]

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Scarlett, contrà, shortly referred to *Macclesfield* v. *Sutton* (*d*), *Rex* v. *Kingswinford* (*e*), and *Rex* v. *North Nibley* (*f*), as in point; where the stipulation in each contract was to work only certain hours in the day, under which no settlement could be gained: and this was in effect to serve only 51 weeks in each year.

Lord ELLENBOROUGH C. J. Here is a hiring for a period of four years, with an exception of a week in every year; that is to be taken distributively, a week out of each year. Therefore the master had no dominion over the servant for any one entire year, but only for one year minus one week in that year, and so on.

Orders quashed.

SHOMBECK *against* DE LA COUR.

Monday, Nov. 21st.

A plea of tender to one count, and a plea of alien enemy to another, cannot be pleaded together.

THE defendant had leave to plead several matters; as to all the matters in the declaration, except 7*l.* 17*s.* 6*d.*, parcel, &c. of the third count, that he did not promise; and a tender of that sum; which the plaintiff refused to accept: and for further plea, as to all but the 3d count, that the plaintiff is an alien enemy. Whereupon *Holroyd* obtained a rule for the defendant to *shew cause why so much of the rule to plead double as applies to the

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(*a*) *Burr.* S. C. 439.
(*b*) *Ib.* 791.
(*c*) 1 *East*, 599.
(*d*) *Burr.* S. C. 458.
(*e*) 4 *Term Rep.* 219.
(*f*) 5 *Term Rep.* 21.

two

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two last pleas should not be discharged, and why those two pleas should not be struck out, upon the ground of their inconsistency. This was now opposed by *Richardson*, who observed that there was no occasion for the rule to plead double as to these two pleas, as they went to different counts; and therefore the case must be taken to be the same as if the defendant had in the common way pleaded a tender as to one count, and a plea of alien enemy as to another. That the plea of alien enemy had been permitted by the practice of this Court, though not in *C. B.* (*a*), to be pleaded with other pleas; and that there was the less reason for the objection, as alien enemy might be given in evidence under the general issue.

The Court however approved of the practice of *C. B.* Lord *Ellenborough* C. J. observed on the manifest repugnancy of these pleas: the plea of tender admitting that the plaintiff had a locus standi in court as to part of the demand; and the plea of alien enemy denying that he had any right to stand in a *British* court of justice, or to recover any thing.

Rule absolute.

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Monday, Nov. 21st.

DELANOY *against* CANNON.

After a writ sued out, and common bail filed, against a defendant by the name of *J.*, it is irregular to declare against him by the name of *R.*, *sued by the name of J.*; and the defendant may set aside the proceedings before plea.

A WRIT was sued out against the defendant by the name of *John*, and common bail filed against him by the same name: and then the plaintiff declared against him by the name of *Robert* (his real name) *sued by the name of* John; on which *Espinasse* obtained a rule nisi to set aside the proceedings for irregularity; against which *Richardson* now shewed cause, and cited *Oakley* v. *Giles* (*b*). But *The Court* observed that the application to set aside the proceedings for irregularity was not made till after judgment, and when the defendant might have before pleaded in abatement; but here it is before plea. He then referred to *Summers* v. *Wason* in *C. B.* (*c*); where a similar objection was over-ruled in the case of bailable process. To which it was answered that the cases of *Green* v. *Robinson* (*d*),

(*a*) In *Thyatt* v. *Young*, 2 *Bos. & Pull.* 72, the Court of *C. B.* refused to allow *non assumpsit* and *alien enemy* to be pleaded together.

(*b*) 3 *East*, 167.

(*c*) 1 *Bos. & Pull.* 105.

(*d*) *H.* 23 *G.* 3. vide 1 *Tidd's Prac.* 366.

and

and others to the same effect (*a*), had not been there mentioned; which cases shewed the proceedings here to be irregular. And the Court made the

Rule absolute.

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DELANOY *against* CANNON.

(*a*) Vide *Doe* v. *Butcher*, 3 *Term Rep.* 611. and *Corbett* v. *Bales*, *ib.* 660.

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BAINBRIDGE and Another *against* NEILSON.

Tuesday, Nov. 22d.

A ship insured from *Jamaica* to *Liverpool* was captured in the course of her voyage, and recaptured in a few days; and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment: and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors in a port in *Ireland*, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession without damage, and arrived at *Liverpool*, and earned her freight; the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent.: held that he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed; and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss. And quære whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss?

The like point was ruled on the freight policy, on which there was a partial loss of 13*l.* 11*s.* 5*d.* per cent.

But at any rate if the underwriters accept the offer of abandonment, made upon such temporary total loss, both parties are bound by it.

THIS was an action upon a policy of assurance upon the ship *Mary*, valued at 6000*l.* at and from *Liverpool* to any port or ports in *Jamaica*, during her stay there, and from thence to her port of discharge in *Great Britain*, &c.: and also upon another policy of insurance upon the *freight* of the same ship from *Jamaica* to her port of discharge in *Great Britain*, valued at 4000*l.* At the trial at *Guildhall* a verdict was found for the plaintiffs for 139*l.* 5*s.* 4*d.*, subject to the opinion of this Court on the following case:—

The defendant subscribed both the policies for 200*l.* each. The plaintiffs at the time of effecting the insurance, and also at the time of the capture after mentioned, were interested in the ship and freight. The ship sailed in due time from *Jamaica* with a cargo and freight bound to *Liverpool;* and on the 21st of *September* 1807 was captured on her voyage home by an enemy; and on the 25th was recaptured. On the 30th of *September* the plaintiffs received intelligence at *Liverpool* of the capture, but not of the recapture; and on the day following communicated the same to the underwriters, and gave notice of abandonment.

On

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BAINBRIDGE *against* NEILSON.

On the 2d of *October* the intelligence of the capture was confirmed; and on the 6th of *October*, being five days after the notice of abandonment, *the plaintiffs received the first intelligence of the recapture of the vessel, and that she then lay at

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Lock Swilley in *Ireland*, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered in their abandonment, but offered to do their best for the benefit of those who should be ultimately concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the plaintiffs compromised with the recaptors; and the vessel has been restored, and has arrived at *Liverpool*, being her port of discharge, according to the terms of the policy, where she is now in safety. And the owners have also, without prejudice, received the freight of the goods on board her, and the proportion of salvage and expenses on such goods. The plaintiffs obtained possession of the vessel at *Lock Swilley* under the said agreement after notice of abandonment, but before the action was brought; and the vessel did not arrive at *Liverpool* until after the commencement of the action. The ship was never taken into an enemy's port, nor did she sustain any damage whilst in possession of the enemy. The amount of the salvage damages and charges upon the ship is 15*l.* 4*s.* 8*d.*, and upon the freight 13*l.* 11*s.* 5*d.* per cent. on the sum insured. The defendant paid to the plaintiffs before the commencement of this action 57*l.* 12*s.* 2*d.*, being the amount of his proportion of an average loss upon the two policies; which sums the plaintiffs accepted, without prejudice to their claim to recover a total loss under their abandonment. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover for a total loss? If they were then the verdict was to stand: if not, the verdict was to be entered for the defendant.

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Scarlett, for the plaintiffs, contended that they had a right to abandon at the time when they gave notice of abandonment, and to abide by such notice, notwithstanding the subsequent recapture and safety of the vessel. What passed after the notice of the recapture cannot make any difference; but the question must be considered the same as if brought to issue immediately after the 6th of *October*, and while the ship was in the possession of the recaptors. This is different from all the former cases of capture and recapture and abandonment, because the abandonment was made while both parties were under a conviction that the vessel was

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was totally lost to be assured by the capture; though before action brought she was known to have been recaptured and in safety. In *Goss* v. *Withers* (*a*) the ship, which was bound from *Newfoundland* to *Portugal* or *Spain*, was captured, and after remaining eight days in the hands of the enemy, was recaptured and brought into *Milford Haven*: on which the assured gave immediate notice of abandonment: and the Court decided, that as between the assured and the insurers of the ship, the capture was a total loss, upon which the assured might abandon. Lord *Mansfield* indeed also relied on the subsequent circumstances; but considered the recapture in the nature only of a salvage; the ship having been carried out of the course of her voyage; and the disability to pursue the voyage still continuing at the time the abandonment was made. So here, after the recapture, the ship was carried into *Lock Swilly* in *Ireland*, which was out of the course [332] of her voyage; and when the plaintiff received advice of it, the ship was out of his possession; and how soon she could be put into her former course could not be known; nor could the plaintiff tell whether it were for his interest to prosecute the voyage or not, when he determined to abide by his original notice of abandonment. The only other case which bears on the question is *Hamilton* v. *Mendez* (*b*). The insurance was on a valued policy on a ship from *Virginia* to *London*; and the ship was captured in the course of her voyage on the 6th of *May*, and was recaptured on the 23d in her way into a *French* port, and brought into *Plymouth* on the 6th of *June*. As soon as the plaintiff, who lived at *Hull* was informed of these events, he wrote to his agent in *London* on the 23d of *June* to give notice of abandonment to the underwriters; which notice was communicated on the 26th, when the underwriters refused to take to the ship, but offered to pay the salvage and other charges of the recapture. The ship was afterwards, on the 23d of *August*, brought by the owners of the cargo and the recaptors to *London*, where she delivered her cargo to the freighters, who paid the freight without prejudice. And the jury found that she received no damage from the capture; and the whole amount of the salvage was only 10*l.* per cent. That was ultimately held to be an average, and not a total loss. It is observable however that there was an interval of 17 days between the arrival of the ship at *Plymouth* on the 6th, and the notice of abandonment sent by the plaintiff on the 23d of *June;* and it cannot be supposed that intelligence of the event was travelling all

(*a*) 2 *Burr.* 683 (*b*) 2 *Burr.* 1198.

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all that time from *Plymouth* to *Hull:* and if before such notice the plaintiff had ascertained that no material loss had been sustained, but that the ship might proceed on her voyage to her destined port at salvage of only 10*l.* per cent., it was too late for him to give notice of abandonment as for a total loss. Lord *Mansfield,* it must be admitted, in giving the judgment of the Court lays down some general positions which seem to trench upon the plaintiff's claim in this case; but he could not have meant them to apply to a case like the present; for towards the conclusion of the judgment he excepts this very case; saying, "we give no opinion how it would be in case the ship or goods be restored in safety *between the offer to abandon and the action brought,*" &c. He had just before said, "To obviate too large an inference being drawn from this determination, I desire it may be understood that the point here determined is, that the plaintiff upon a policy can only recover an indemnity, according to the nature of this case at the time of the action brought, or, at most, *at the time of his offer to abandon.*" If the latter be adopted as the rule, then as the offer was made upon the first intelligence of the capture, and while both parties continued in ignorance of the re-capture, the plaintiff's right to abandon cannot be disputed. [Lord *Ellenborough* C. J. When Lord *Mansfield* in the same sentence says, that "the plaintiff upon a policy can only recover *an indemnity according to the nature of his case,*" is that to be understood of the *supposed* nature of his case, or of the *real* nature of it?] It must mean the nature of the case as it bonâ fide appears to the parties at the time. The plaintiff's claim is grounded on two propositions; 1st, That the offer to abandon having been rightly

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made at the time, a right of action became vested in the assured, which could not be defeated by subsequent events. 2dly, That when the ship was recaptured and carried into *Lock Swilley,* it was still the subject of abandonment. As to the first, it cannot be denied; because after intelligence of the capture received and the offer made to abandon, the plaintiff might instanter have brought an action against the underwriters to recover a total loss; and their refusal to pay cannot now vary his claim as it then stood. And if a case for abandonment exist at the time, and the party do abandon, no subsequent event can do away the effect of it, but the question is concluded. This is in every day's experience. [Lord *Ellenborough* C. J. The question is whether *the right* to abandon did exist at the time it was made: the *supposed* right of abandonment existed: but it remains to be shewn that the *supposed* is the same as the *real* right to abandon.] If the parties

ties act bonâ fide on the notice they have of the fact, that is sufficient for the purpose of insurance. In the case of a distant voyage, and intelligence received of a capture, if the assured could not abandon immediately, but must wait for final intelligence of the ship being carried into the enemy's port, much inconvenience may ensue, for want of such active endeavours to recapture and make the best of the loss as would otherwise be made. Suppose after notice of a loss and an offer to abandon, which the underwriters agree to accept, it afterwards turns out that there has been no loss; as in some of the late cases of the *Russian* embargo; yet the parties are bound. [Lord *Ellenborough*, C. J. There, both parties agree to act upon the supposed case, whatever the event may turn out to be.] 3dly, The ship was still the subject of abandonment when recaptured and carried into *Lock Swilley* in *Ireland*. In these cases the knowledge of the assured as to the true state and condition of the ship is a material circumstance. In [335] *Hamilton* v. *Mendez* it must be taken from the length of time intervening, being 17 days between the arrival of the ship at *Plymouth* and the sending notice of abandonment from *Hull*, that the assured had full knowledge of every thing. But here the plaintiff could not have had time to acquire information whether or not it were his interest to abandon, as he renewed his notice immediately upon receiving intelligence of the ship's arrival at *Lock Swilley*. Suppose after a recapture the ship is taken into a distant port out of the course of her voyage; if the assured be to wait for full intelligence of all the facts before he gives notice to abandon, the underwriters may object that the notice comes too late, when the event would be probably known. It is sufficient however if in fact the assured at the time of the notice given be ignorant of the circumstances from whence he can tell whether or not it is his interest to abandon. From the mere knowledge of the fact of the ship being in safety in the possession of the recaptors at *Lock Swilley* in *Ireland*, which was out of the course of her voyage, he could not tell what damage she had received, how many of her crew remained, or how soon she might be able to prosecute her voyage to its termination. The case of *Goss* v. *Withers* bears strongly in point. There the owner had heard that his ship was recaptured and carried into *Milford Haven*, but in what state and condition he could not tell, and therefore he made his election to abandon; which it was held that he had a right to do. [Lord *Ellenborough* C. J. Do you contend that the intelligence of the recapture, and that the ship was in safety in a port in *Ireland*, gave the plaintiff a new right to abandon?]

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That is not necessary in this case, where there was previous notice to abandon *given immediately after intelligence of the capture. But, taking the whole sum of the intelligence together, it amounts to notice of capture and recapture, and that the ship was then in the possession of the recaptors, in the port of another country, out of the course of her voyage, and with the prospect of continuing in ignorance of the actual state of things for three weeks, and with a probability of the ship continuing there for some time longer.

Holroyd contrà. All the circumstances of the case are material to be considered; and the plaintiff cannot convert that which in its nature and in fact is only a *partial*, into a *total* loss, by offering to abandon. The action is brought upon two policies, both valued; one on the ship, the other on the freight: upon the latter it is admitted that there has been no loss at all by the capture; and the loss in fact upon the ship is only 15*l.* 4*s.* 8*d.* per cent. Where the assured and the underwriters do not agree upon the abandonment, the right of either party can only depend upon the actual state of things at the time when the notice is given; and when the notice was given the loss had ceased to be total, and was in fact only a partial loss; though this was not known till afterwards. Nor does it follow that because intelligence was received of a capture, an action would have lain immediately against the underwriters upon notice to abandon; for it would be incumbent on the assured to make out the fact of a total loss, which could not be known with certainty till a reasonable time had elapsed to learn the final issue; and the material fact to be proved is that there was a total loss *at the time of the offer to abandon.* The intelligence might have come away immediately after the ship struck to the enemy, and when other vessels were in sight, so as to render the final issue very uncertain. And even after an actual capture and possession by the enemy, there is the chance of a recapture within a reasonable time, of which the underwriter is entitled to avail himself any time at least before the action brought. If it were otherwise, a door would be opened to fraud, in the case of valued policies, which are generally valued highly, and hold out a strong temptation to the assured not to make those exertions to avoid or redeem a total loss which would, under other circumstances, be made. In *Hamilton* v. *Mendez* (*a*), Lord *Mansfield* enumerates the circumstances which continue the total loss notwithstanding

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(*a*) 2 *Burr.* 1209.

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a recapture: "If the voyage be absolutely lost, or not worth pur- "suing: if the salvage be very high: if further expence be ne- "cessary: if the insurer will not engage in all events to bear that "expence, though it should exceed the value, or fail of success," &c. He also refers to the instances in *Le Guidon* of a total loss where the assured may abandon: "if the damage exceed half "the value of the thing; or if the voyage be lost, or so disturbed "that the pursuit of it is not worth the freight." Now none of those circumstances exist in the present case: the voyage was not lost, though the ship was carried by the recaptors into a port a little out of her course, where she was known to be in safety; and in fact she did afterwards perform her voyage, and earned all her freight, and the salvage is very low. Lord *Mansfield* further says, that "the action must be founded on the nature "of the plaintiff's damnification, as it really is *at the time of* "*the action brought;* for that it is repugnant, upon a contract [338] "of indemnity, to recover as for a total loss, when the final "event has decided that the damnification in truth is an *average* "or perhaps *no* loss at all." The plaintiff might not know that the loss was only partial when he offered to abandon; but the master on board knew the fact: and where the master is a part owner, as it frequently happens, a different rule must be laid down: for the ignorance of his partner, or of his agent on shore, who procures the assurance to be made, certainly cannot entitle him to abandon upon a supposed fact, the contrary of which was known to him at the time the offer to abandon was made; which shews how dangerous and difficult a rule it would be to proceed upon the supposition of any of the parties, and not upon the fact. It may be admitted that if both parties agree to treat the case as a total loss, and the underwriter pay his money, it will bind both; as in *Da Costa* v. *Firth* (*a*). And there is a mutual consideration to sustain such an agreement though it should turn out to have been made upon false intelligence; for the assured ceases to labour for the ship, and the underwriter takes that labour upon himself, upon the chance of matters turning out more favourably for him. The case of *Goss* v. *Withers* (*b*) is very distinguishable from this; for the ship there was so much disabled by a storm previous to her capture as to be incapable of proceeding on her destined voyage without going into port to refit: and part of the cargo having been thrown overboard during the storm, and the rest spoiled while she lay in *Milford Haven*, and before she could be refitted,

(*a*) 4 *Burr.* 1966. (*b*) 2 *Burr.* 683.

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the voyage was entirely lost at the time of the offer to abandon. Lord *Mansfield* says that the loss continued *total as to the destruction of the voyage; and the recovery of any thing could only be had upon payment of more than half the value. With respect to the policy on freight, the whole of which had been earned, he referred to *M'Carthy* v. *Abel* (*a*) as in point to shew that nothing could be recovered: the whole freight having been earned, and consequently no loss within the policy. That case was stronger than this, because the offer to abandon was made during the continuance of the *Russian* embargo, which was afterwards taken off; and being a *chartered* ship, the freight could not be due to the underwriters to whom the ship was abandoned and assigned, because it grew upon a contract which was personal, and the new ship owners were not obliged to bring home the cargo. But as the loss was not total at the time of the action brought, and the underwriters had not done any thing to fix it on themselves, the plaintiff M'Carthy could not recover. At any rate the present plaintiff cannot be entitled beyond the amount of the partial loss paid to him before the action brought.

Scarlett, in reply, maintained that the action would have lain against the defendant to recover a total loss at the time of the original abandonment; for on the proof of the first intelligence, it would be taken that the capture continued; and it would lie on the underwriter to prove the recapture, and that the ship was restored to the owner, and was again prosecuting the voyage insured. The case of a captain, part owner, might make a distinction; but that is not the present case; and here there is no fraud imputable to the plaintiff. In *M'Carthy* v. *Abel* the Court went

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on the ground that the loss, if any to the plaintiff, (for in fact there was no loss of the thing insured, which was freight,) arose from his own act, and not from any peril insured against. If there had been no abandonment, or if the same underwriters had insured both ship and freight, no question could have arisen. But here there has in fact been a loss, and that by a peril insured against; and the only question is, whether it shall be deemed a total or only a partial loss; there having at one time been a total loss, and the offer to abandon having been made bonâ fide while the plaintiff had reason to believe that the loss continued total.

Lord ELLENBOROUGH C. J. This is a case, which, though new in species, is by no means new in principle. And though

(*a*) 5 *East*. 398.

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Lord *Mansfield* said, in *Hamilton* v. *Mendez*, that he would not give an opinion how the case would be if the ship were restored in safety between the offer to abandon and the action brought, yet there can be no doubt from the whole of his reasoning on that case what his decision would have been under these circumstances. The facts here are that the ship was captured on the 21st of *September*, and recaptured on the 25th; after which, the plaintiff having received intelligence on the 30th of the capture, but not of the recapture, gave notice of abandonment on the 31st; which he persevered in after the 6th of *October*, when news of the recapture arrived, and that the ship was safe in a port of *Ireland;* but which notice the underwriters did not accept. And now it appears that instead of a total loss, there has been a small partial loss of 13*l.* and a fraction, for salvage and charges on the policy on freight, and 15*l.* and a fraction on the ship policy, and that no damage whatever was sustained by the ship while in the possession of the enemy. And the question is, [341] whether that which in the result turns out to be only a partial loss to a trifling extent shall, because of the notice of abandonment given when a total loss appeared to exist, be now recovered as a total loss? To give effect to such an attempt would greviously enlarge the responsibility of underwriters: it would be to make them answerable, not for the actual loss sustained by the assured whom they have undertaken to indemnify against the risks stated in the policy, but for a supposed total loss, which had in fact ceased to exist. It has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events. But that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment: but it is not enough that it was properly made, upon facts which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made upon notice received, and bonâ fide credited, by an assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turned out to be a forgery; and yet clearly no right of action would vest in him founded upon an abandonment made upon false intelligence, and without any thing in fact to warrant the giving

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giving of such notice. What is an abandonment more than this, that the assured having had notice of circumstances, which, if true, entitle him to *treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on
[*342] the underwriter, who is to save himself as well as he can. But does not all this presume the existence of those facts on which the right accrues to him to call upon the underwriter for an indemnity; and if they be all imaginary, or founded in misconception, or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act, (the recapture,) which saves the thing insured from sustaining a total loss; the whole foundation of the abandonment fails. It is then said that if the right of abandonment once vested and be exercised in time, it cannot be divested by subsequent intelligence of other circumstances or different events. But the case of *M'Carthy* v. *Abel* shews the contrary; for there, though the notice of abandonment were well made at the time, it was not only divested by subsequent circumstances, but by circumstances which happened after the notice of abandonment had been given. Next it is contended that by the recaptors taking the ship into a port in *Ireland* the right of abandonment was revived, or a new right created; for I do not exactly understand whether this be insisted on as an entire and distinct cause of abandonment, or as connected with the antecedent capture and recapture. Now if it grew out of the recapture, let us hear what Lord *Mansfield* said upon that subject in *Hamilton* v. *Mendez*. It does not, he says, cease to be a total loss because of the recapture, "*if* the voyage is absolutely lost, or not worth pursuing;" [here the voyage was not lost, and was worth pursuing, and was pursued with effect:] "If the salvage is very high:" [here it is very trifling:] "if further expence is neces-
[343] sary; if the insurer will not engage in all events to bear that expence," &c. But here the further expences were little or nothing beyond the salvage, and all the loss has been actually paid into the plaintiff's hands. If after the recapture the ship had been carried into a port abroad, and a sale had become inevitable, because nobody would secure to the recaptors their 1-8th, it might have been deemed to be a total loss; but that is not the present case. What was said by Lord *Mansfield*, however, is sufficient to shew that in the case of a capture and recapture, it does necessarily follow that the assured is entitled to abandon as for a total loss; but it depends upon circumstances; and none of the circumstances enumerated by him exist in the present case.

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I cannot however consider, as at present advised, that the right of abandonment relates only to the actual state of things at the time of the offer to abandon made. If it were necessary to the decision of this case, I should wish to have that point well considered. I am not disposed to enlarge the grounds of abandonment against underwriters, a privilege which, every body knows, has been much abused. In almost every case of a valued policy it is the interest of the assured to abandon; and therefore it behoves the Court to watch every such case, and in no instance to enlarge that which in the nature of the thing is only a partial, into a total, loss. It might as well have been said in *M'Carthy* v. *Abel*, that having been once a total loss, it must continue so: but the Court held otherwise; and that case is not distinguishable in this respect from the present, except that there eventually was no loss there of the subject-matter of the insurance, and here there is only a partial loss: but I can see no difference whether that which for a time was a total loss ceased altogether by subsequent events to be any loss at all, or whether it be reduced by subsequent events to so small a loss as there is in the present case. We must look, as we lately said in *Godsall* v. *Boldero (a)*, to the real nature of the contract in a policy of insurance, which is nothing more than a contract of indemnity; and therefore, though there was a total loss there, as it might be called with respect to the subject-matter of the risk insured; yet that having afterwards intervened between the supposed damnification of the plaintiffs by the death of Mr. *Pitt*, and the action brought, which adeemed the loss, it was held that they could not recover. So here, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small loss has been incurred in the salvage; that is the real amount of the damnification which the plaintiff is entitled to receive under this contract of indemnity, and that has already been paid by the underwriters.

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GROSE J. This is a case upon which it is said that Lord *Mansfield* in *Hamilton* v. *Mendez* professed to give no opinion; but it it is very clear what his opinion would have been upon the principles laid down by him in the same case: and if there be no express decision on the point, we must resort to principle in deciding it. And one of the best principles upon this subject is that no artificial reasoning shall turn that into a total loss, which in fact is only a partial loss. A policy of insurance is only a

(*a*) 9 *East*, 81.

promise

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promise by the underwriter to indemnify the assured against loss by certain risks: and if so, how can the plaintiff claim a total loss, when in fact the vessel insured has *performed her voyage, and he has only sustained an actual loss of 15*l.* 4*s.* 8*d.* per cent. on the ship, and 13*l.* 11*s.* 5*d.* per cent. on the freight insured. The case states that which is very material, that the plaintiff had possession of the ship again after the recapture, *and before the action brought;* that she sustained no damage from the capture, while she continued in the possession of the enemy; and that she has been restored and has arrived at her port of discharge; and that the freight has been received by the owners. What pretence then is there for saying that this is a total loss, where no damage has been done to the ship, and only a trifling expense incurred for the salvage and charges of the recapture? We must look here to the time of the action brought to see whether there has been a total loss of the subject-matter to the plaintiff, as he alleges; and it is clear that at the time there was not a total but only a small partial loss.

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LE BLANC J. I agree in opinion that there must be judgment for the defendant upon this case, which though new in circumstances is not so new in principle. The main stress of the plaintiff's argument has been, that at the time of the notice of abandonment he had a *right* to abandon. But there is the fallacy of it. It does not follow that he had a right to abandon because he had a right to give notice of abandonment upon the faith of the intelligence first received. At the time of the capture he had a right to give such notice; but at the time when the notice was actually given, the ship had been recaptured and was carried into *Lock Swilley* in *Ireland*, a port of the united kingdom, in the course of her voyage home: and there is no evidence of any damage sustained either by plunder of or by mischief done to the ship, cargo, or crew, which could make it a total loss. It is impossible then to say that the want of knowledge by the assured of the true state of things shall vary the fact, and make that a total loss which is only a partial loss. None of the decided cases of total loss come up to the present; and not even the cases put by Lord *Mansfield* in *Hamilton* v. *Mendez*. The plaintiff knew of some of the circumstances, but did not know them all. The mere circumstances of capture and recapture will not make it a total loss. It may often happen that intelligence is received which will justify the giving notice of an abandonment; but if circumstances so turn out, that there is no total loss, it does not follow that the assured would be entitled to insist on his notice

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tice. In *M'Carthy* v. *Abel* the assured was justified in giving notice of abandonment, but circumstances happened afterwards which shewed that there was no loss of the subject-matter. So here, circumstances have turned out to shew that only a partial, and not a total loss, has been sustained; though the notice of abandonment were properly given at the time upon the intelligence then received. This case falls in very much with an expression used by the Chief Justise in delivering the judgment of the Court of C. P. in a late case of *Thellusson* v. *Shedden* (*a*), where he says, "it is true that a capture simply proved establishes a total loss; but when the plaintiff in the same breath proves a recapture, there is an end of the capture and total loss, and the plaintiff is entitled to a partial loss only. So here, though a capture were proved, yet it also appearing that there was a recapture; unless it be also shewn that, notwithstanding the recapture, it still continued a total loss, it is only a partial loss.

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BAYLEY J. The case has been so fully discussed that I can add nothing to make it more clear. A policy of insurance is only a contract of indemnity, and any thing which tends to shew that an assured can recover beyond his indemnity is against the very principle of the contract: and here it would plainly lead to fraud if the plaintiff who has in fact only sustained a partial loss to a small extent, could recover beyond what would indemnify that loss. But it is said, that upon receiving intelligence he had a right to abandon immediately. I agree that it was prudent in him to give such notice at the time, and if things had stood in the same situation he would have been entitled to abandon: but I consider that notice as including this implied condition, that things continued to exist as the plaintiff supposed they did exist at the time when he gave the notice; and if any thing happened afterwards to make that a partial, which at one time was a total, loss, the ignorance of that fact by the assured would not make it a total loss. The case of *M'Carthy* v. *Abel* shews that subsequent facts will vary the right of the party to abandon as for a total loss, when ultimately no loss is incurred within the policy. Suppose a capture, and the captors afterwards give up the ship, and she pursues her voyage as before, and the assured receiving intelligence of the capture, but not of the release, give notice to abandon; yet if the voyage be afterwards performed, would that entitle the assured to make it a total loss, when he had sustained no actual loss at all, though the voyage might have been a little

(*a*) 2 *New. Rep.* 230.

delayed

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delayed? Yet that would shew that circumstances happening after a *total loss once existing may take away the right to abandon. Then if the fact be that at the time of the notice to abandon given, it was not a total, but only a partial loss, the giving such notice could not entitle him to abandon as for a total loss. By deciding that in all these cases the right of the party to abandon shall depend upon the actual circumstances of the case, and not upon those which are merely supposed to exist at the time, no injustice will be done, and it will make the policy that which it ought to be, and really is, a contract of indemnity.

Postea to the Defendant.

Monday, Nov. 21st.

FRENCH, Clerk, *against* TRASK.

Prohibition granted on affidavit that the defendant (to a libel for tithes in kind in the spiritual court) *answered on oath* or *pleaded* a modus; without its appearing that the modus was regularly pleaded below, so as to be put in issue there.

THE plaintiff rector of *Odcombe* in *Somersetshire*, libelled the defendant, a parishioner, in the consistorial archdeaconal court of *Wells* for tithe in kind: and *Dampier* on a former day moved for a prohibition upon an affidavit that the defendant had "answered on oath or pleaded in the said court to the said libel" a modus of 40*s*. payable at *Easter* for the farm of which he was possessed, in lieu of tithes and ecclesiastical dues in respect of the same, which he had duly tendered to the rector, who refused to accept it.

Barrow now shewed cause, and objected that the defendant had only put in an answer of a modus in the court below, but had not regularly pleaded it; and that there was a distinction recognized in the practice of the ecclesiastical courts between those two stages of proceeding; consequently this application came too soon; for before plea there could be no issue, and it could not be told till then that the ecclesiastical court was proceeding to try the modus. And he cited *Stone* v. *Harwood* (*a*), and *Broughton* v. *Hustler* (*b*), as in point. And to a question by the Court, whether

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(*a*) *Rep. temp. Hardw.* 357.

(*b*) *Tr.* 1 *Geo.* 1. 1. *Br.* 3. *Gwillim's Tithe Cases*, 951. "Suit in the spiritual court for tithes of loppings of trees. The defendant by his answer in that court had alleged that the trees were above 20 years growth, and therefore not titheable; after which he moved in *B. R* for a prohibition, suggesting the matter contained in his answer in the spiritual court, with an affidavit of the truth of it. *The Court* denied a prohibition; for the party should have pleaded this matter

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ther the suggestion were not verified here by affidavit; he answered that it was not. (But *Dampier* said, that the time was not out for verifying it.) He also referred to a case of *Stainbank* v. *Bradshaw (a)* in last *Easter* term; which at first was supposed to have been like the present; and that the Court had refused a prohibition because the modus had not been put in issue by pleading it below. But *Le Blanc* J. observed that that was after sentence: and *Bayley* J. said that it could not be permitted to a party to take the chance of a trial below, and when that was decided against him to come to this Court and object to such trial *(b)*. And finally

Lord ELLENBOROUGH C. J. said (and the rest of the Court agreed) that there must be a prohibition in this case; for it appeared that there was nothing to try in the court below but the modus insisted upon in the defendant's answer.

Rule absolute for a Prohibition as to the Trial of the Modus.

matter in the spiritual court, and have produced an affidavit that the Court had refused to receive such plea." And 2 *Ld. Ray*, 835. *Far.* 137. and 2 *Inst.* 643. were cited.

(*a*) It was stated in that case, by the party moving for the prohibition, that there were two questions raised by the proceedings before the ecclesiastical court, which that court had no jurisdiction to try; 1st, Whether a certain part of the land in respect of which tithe of hay and agistment tithe were claimed was within the parish; and, 2dly, Whether certain other land were *lay* land, *i. e.* hard dry land, in opposition to natural meadow or moist land, and whether it were covered by a modus. But there was great doubt upon shewing cause whether, upon the face of the proceedings brought before the Court by the suggestion, and upon the face of the sentence, these facts had been in issue below: and finally Lord *Ellenborough* C. J. said—This is an application *after* sentence. But it does not appear from the sentence, nor from the suggestion, that the Court below have proceeded to try the question of the boundary of the parish. And as to the question whether the land were natural meadow or not, the party applying for a prohibition should have come before sentence: for if he will lie by and suffer the fact to be tried below, it is too late to come after sentence.

(*b*) Vide *Offley* v. *Whitehall*, *Bunb.* 17.

Tuesday, Nov. 22d.

HODSON and MARY his Wife *against* SHARPE and Another.

A lessee of land in the *Bedford* Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 *Car.* 2. *c.* 17. for want of being registered; such act, enacting that "no "lease, &c. "should be of "force but "from the "time it "should be "registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers registering their titles before.

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THE plaintiffs declared in covenant, that one *W. Wells*, being seised in fee of the demised tenements at *Upwell* in *Norfolk*, on the 8th of *September* 1798, by indenture of that date, demised the same to the defendants for 11 years, under certain covenants to keep the premises in repair, &c. That *Wells* afterwards on the 12th of *August* 1801 devised the reversion of the premises to the plaintiff *Mary* in fee, and died, &c.: and then alleged a breach for non-repair, &c. To which the defendants pleaded, amongst other matters, that the land intended to be demised by virtue of the said indenture, *before the making thereof was parcel of the 95,000 acres mentioned in the stat. 15 *Car.* 2. *c.* 17. for draining the *Bedford* Level and incorporating the adventurers by the name of the governor, bailiffs, and commonalty of the company of conservators of the Great Level of the fens, and giving them a common seal. By *s.* 8. of which it was enacted that all conveyances by indenture of the said 95,000 acres, or any part thereof, entered with the registrar (one of the officers named in the corporation) in a book to be kept for that purpose, should be of equal force to convey the freehold and inheritance of the same as if by indenture inrolled within six months of record at *Westminster*; and it was further enacted that no lease, grant, or conveyance, &c. of the same (except leases for 7 years or under, in possession) should be of force but from the time it should be entered with the said registrar as aforesaid, &c. And then the defendants averred that the said indenture hath at no time whatever hitherto been entered with the registrar for the time being, appointed by the corporation, in manner and form as required by the said act; by reason of which the indenture is of no force. To which there was a general demurrer.

Best, in support of the demurrer, contended that the lease, though invalid till registered, as against third persons claiming adversely, was yet binding between the parties themselves, notwithstanding the words of the act, that "no lease, &c. (except leases for 7 years or under in possession) should be of force but from the time it should be entered with the said registrar:" for that

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that only means *of no force as against third persons.* [*The Court* then said they would hear what could be urged against that construction; for the general object of this and *other acts of the like kind was to give notice to third persons, and thereby prevent frauds.] [*352]

Burrell contrà relied on the positive words of the act, that no lease (such as that in question) should be of force but from the time of registering it: and referred to *Doe* v. *Barber* (*a*), where it was held that the lessee of a rectory house, the lease of which had become void under the stat. 13 *Eliz. c.* 20. by the non-residence of the rector, could not recover in ejectment even against a stranger who had entered without title: the words of that statute being "that no lease shall endure any longer than while the lessor shall be ordinarily resident, &c.; but that every such lease, &c. immediately upon such absence shall cease and be void."

Lord ELLENBOROUGH C. J. That was an action against a stranger to the title of the lessor, and therefore the defendant was not estopped from disputing it: but in *Cook* v. *Loxley* (*b*), which was an action for use and occupation by a rector against his tenant of the glebe lands, the defence attempted to be set up was that the rector had been simoniacally presented, which would have avoided his title to the rectory: but the Court agreed that it was a universal rule, that a tenant should not be permitted [353] to set up any objection to the title of his landlord under whom he held: that this was not a mere technical rule, but one founded in public convenience and policy. Here the lessee has had all the benefit which he could derive under the lease; and now he sets up an objection to it, that it is not registered; which he shall not be permitted to do. The act no doubt meant for the protection of titles that leases and conveyances within this district should be registered, that every person interested in the inquiry might know in whom the title to any such land was: and therefore as against persons who have been deceived by the omission to regis-

(*a*) 2 *Term Rep.* 749.

(*b*) 5 *Term Rep.* 4. and vide *Blake* v. *Foster*, 8 *Term Rep.* 487. and vide *Graham* v. *Peat*, 1 *East.* 244. where one in possession of glebe under a lease void by the stat. 13 *Eliz. c.* 20., by reason of the rector's non-residence, may yet maintain trespass upon his possesson against a wrong-doer. But in *Frogmorton* v. *Scott.* 2 *East*, 467, it was held that a rector, whose own lease was avoided by his non-residence, might recover in ejectment against his own lessee. The lease, however, was there held to be void on another ground, as having been made to a spiritual person against the provision of the stat. 21 *H.* 8. *c.* 13. *s* 3.

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ter, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law: but not as between the parties themselves to the lease, between whom the act was not meant to operate.

GROSE J. assented.

LE BLANC J. The defendant has enjoyed the land under the lease almost to the end of the term, and now objects that it is of no validity, because it is not registered: but the object of that clause in the act on which he relies was to take away the priority of the party whose title was not registered, with respect to subsequent claimants whose titles were registered: but it never was intended to operate between the parties themselves, so as to enable a lessee who has enjoyed under it to dispute the lease.

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BAYLEY J. The object of this registry act is like that of all others, to protect the title of third persons; but not to enable the parties themselves to set it up against their own acts. Here too the defendant has enjoyed under the lease during the time in which the breaches of covenant were committed, and therefore, even if the lease were void, I should have been much disposed to have considered that he was liable on his covenant, as an independent covenant: but it is not necessary to decide that point, as the case is clear on the other ground.

Judgment for the Plaintiff.

Saturday, Nov. 23d.

The KING *against* The Inhabitants of ABERYSTWITH.

One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house-door with a friend, and had the garden cultivated for his own benefit as usual, is liable to be rated to the relief of the poor as occupier of the whole house.

RICE WILLIAMS was rated as a householder to the poor's rate of the parish of *Aberystwith;* and not paying the same, nor shewing any cause why he should not, to the magistrates before whom he was summoned, they issued a warrant of distress against him to levy 4*l.* 1*s.*, the amount of the several rates within the year; against which warrant of distress he appealed to the Sessions, on the ground principally, that he was not an inhabitant and occupier of such messuage, lands, and tenements as would make him rateable. The Sessions admitted the appeal, and ordered the warrant of distress to be quashed, subject to the opinion of this Court on the following facts.

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The appellant was rated to the relief of the poor of the town of *Aberystwith*, in the county of *Cardigan* in eight several rates, from *August* 11th 1806 to *August* *14th 1807, amounting in the whole to 4*l.* 1*s.*; to levy which two magistrates, upon summons, granted a warrant of distress against his goods, dated 2d of *October* 1807; and the distress being made, the appellant appealed against it; and the Sessions annulled the warrant of distress and the several rates; although two of them, the 7th and 8th, were made after the time of the return of the appellant and his family to his house, under the following circumstances. The appellant has kept a house in *Aberystwith* many years; and having been surgeon of the *Cardigan* militia, was occasionally absent from home, and sometimes his family; leaving one *J. Francis*, his assistant, in a part of the house. In *July* 1806, the appellant being previously absent, his wife and daughter left the house, having previously had the same parted off from the shop by laths nailed in the passage; so that *Francis* had only the use of the shop. The family did not return till *May* 1807; and during their absence a Mrs. *Hughes*, a person with whom the key of the house was left, had the garden dug up by the same person (a tenant of the appellant's) who always dug it, and who charged the appellant for his work, and looked to no other person to pay him for it. Mrs. *Hughes* always permitted two persons, Mrs. *Southern* and Mrs. *Longcroft*, one of whom was a particular friend of the appellant's, with their servants to reside in the house six weeks or two months during the time the appellant's family were absent: and the appellant's furniture continued in its usual situation in all the rooms of the house, ready for the reception of the family, during the whole time. Coals were delivered into the house. And all parts of the house (save the shop) communicated with the garden, through which the above-mentioned persons and others entered the house. The question for the opinion of the Court was, Whether the occupation of a part of the house by *Francis* during the whole time; the occasional occupation of other parts by Mrs. *Southern* and Mrs. *Longcroft;* the garden being cultivated as usual; and the appellant's furniture remaining in its situation in the several parts of the house ready for the reception of the family during the whole time; was an occupancy by the appellant? If the Court thought this was not an occupancy sufficient to charge the appellant with the whole of the rates: then, whether the Sessions ought not to have made an order, confirming the two last rates made after the return of the appellant and his

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family, and not have allowed the appeal and annulled the warrant of distress generally.

Peake and *W. E. Taunton*, in support of the order of Sessions, first referred to the stat. 17 *Geo.* 2. *c.* 38. *s.* 7., which gives the appeal against a warrant of distress for a poor's rate; and which, they observed, was the most beneficial mode for all parties of disputing the legality of the distress: for if the party rated be no occupier, he cannot suppose that his name will be on the rate, and therefore cannot be prepared to appeal against that: but the justices who grant the warrant, and the officer who distrains upon him, would be liable in trespass for an excess of jurisdiction (*a*). Next they argued that the appellant was not the *occupier* of the premises for which he was rated: but that though he were occupier of part, yet if he did not occupy the whole, the warrant of distress being for an aggregate sum, for part at least of which he was not liable, would be illegal, according to *Milward* v. *Caffin* (*a*).

[357] [*Le Blanc* J. The case does not state what he is rated for, whether for the house and land, or for the land without the house; and therefore if he be rateable at all, we cannot enter into the question of the quantum.] The Court must take it upon this case that he was rated for the whole; for the Sessions state the question to be whether the occupation of different parts of the house by the different persons who were suffered to have a temporary use of it, were an occupation of it by the appellant, so as to charge him with the whole of the rates. Now neither the appellant himself nor any of his servants or family had any actual occupation of the house, nor even the key of it; nor had the person with whom the key was left any authority to permit others to dwell there: and the occupation of *Francis*, who was let into possession of a part by the appellant, was confined to the shop, which was partitioned off from the rest of the house.

Lord ELLENBOROUGH C. J. The appellant must be taken to have been the occupier of his house during the whole period. He left his home for a time; but he left part of his house in the occupation of his assistant, who carried on his business in his absence; and the key of the house was left with a friend, and the garden continued to be cultivated for his own benefit as usual; to say nothing of the occupation of his friends in his absence. There

(*a*) *Milward* v. *Caffin*, 2 *Blac. Rep.* 1331. That was in replevin. But where the magistrates have jurisdiction, the party rated must appeal, and cannot question the propriety of the rate in an action of trespass, *Hutchins* v. *Chambers*, 1 *Burr.* 580, and *Durant* v. *Boys*, 6 *Term Rep.* 580.

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is no instance where a man has been permitted to carve out the occupation of his house in the manner now attempted; locking up one room and then another, but using as much of the house as he found convenient. This would make a new system of occupation by subdivisions. This is something like the case of Mr. *Egerton (a)*, some years *ago. As to the other point, upon the right of appeal against the warrant of distress, (on which the respondents' counsel had expressd a wish to have the judgment of the Court,) we give no opinion upon it, and therefore cannot prejudice the question whenever it may be necessary to decide it.

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Per Curiam, Order of Sessions quashed, and Rate confirmed.

(a) *Rex v. St. Mary the Less, Durham*, 4 *Term Rep.* 477.

BROOK and Others, Assignees, *against* TRIST.

Thursday, Nov. 24th.

WALTON opposed a rule on the plaintiff to accept common bail, and to deliver up the bail bond to be cancelled because of the insufficiency of the affidavit to hold bail. The affidavit was made by the bankrupt, that the defendant was indebted to the plaintiffs, his assignees, in 60*l.* 13*s.* 10*d.* "for interest-money under and by virtue of *an agreement* under the hand of the defendant." And he cited *Jenkins* v. *Law (b)*, where the affidavit to hold to bail stated the defendant to be indebted "for *damages awarded*, and for costs and expenses taxed and allowed;" which was held sufficient, without describing the award more particularly. But

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiffs so much for interest-money, under and by virtue of *an agreement*, is not sufficient.

Lord ELLENBOROUGH C. J. said this was too general, without describing more particularly the agreement. It might as well be stated that the defendant was indebted so much for damages for the *breach of an agreement*. And the Court would have made the rule absolute:

But *Walton* then objected that the application was out of time: and *Espinasse*, contrà, not being able to account for the delay, the rule was discharged on that ground.

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(b) 1 *Bos. & Pull.* 265.

Thursday, Nov. 24th.

BOWDELL *against* PARSONS.

Where a request to the defendant to do do an act is necessary to be alleged in order to give the plaintiff his cause of action; and it is alleged, but without a particular venue, (there being a general venue laid in the preceding part of the declaration;) such omission cannot be taken advantage of in arrest of judgment since the stat. 4 *Ann.* c. 16. *s.* 1., being mere matter of form, available only upon special demurrer: and this, though judgment passed by default, on which a writ of inquiry was executed. And where, in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver to and suffer the plaintiff to take it away as he wanted it, *when requested*, an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of residue to other persons, supersedes the necessity of alleging a request to deliver, &c. the residue.

THE first count of the declaration stated, that whereas on on the 10th *May* 1808, at *Ware* in the county of *Hertford*, in consideration that the plaintiff at the request of the defendant had purchased of him a stack containing twelve loads of hay, at the rate of 5*l.* 10*s.* per load, to be therefore paid by the plaintiff to the defendant, and which stack was to be taken away by the plaintiff as he might want it, the defendant undertook and promised the plaintiff that he would deliver to and suffer him to take away the same, as he might want it, *when he should be thereunto requested.* And the plaintiff averred, that though the defendant did deliver to and suffer the plaintiff to take away one load of the said hay which was then and there paid for by the plaintiff at the rate aforesaid; and although the plaintiff was ready and willing to have taken away the residue and to have paid for the same, &c.; yet the defendant, not regarding his said promise and undertaking, did not nor would deliver to or suffer the plaintiff to take away the residue of the said stack, *although he was requested by the plaintiff so to do;* but has always hitherto refused and still refuses; and on the contrary afterwards *sold and disposed of the said residue *thereof to other persons, without the consent and against the will of the plaintiff,* and the said residue of the hay still is wholly undelivered to the plaintiff; and by means of the premises the plaintiff lost great profits, &c. and was obliged to buy other hay at an advanced price, to wit, at *Ware* aforesaid. The second count stated, that whereas on the said 10th of *May* in the year aforesaid, at *Ware* aforesaid, in consideration that the plaintiff, at the request of the defendant, had purchased of him a certain other stack of hay, at the rate of 5*l.* 10*s.* per load, to be therefore paid to the defendant, the defendant undertook and promised the plaintiff to deliver to and suffer him to take the same, *when the defendant shall be thereunto afterwards requested.* And the plaintiff averred, that although the defendant did afterwards deliver to him a part, to wit, one load of the hay, which was then and there paid for by the plaintiff at

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the rate aforesaid, *and did request of the defendant* to deliver to and suffer him to take the same; yet the defendant, not regarding his said promise and undertaking, did not nor would, *although duly requested*, deliver to or permit the plaintiff to take the residue, &c. but so to do wholly refused and still refuses: and by means of such refusal, &c. the plaintiff was put to great inconvenience and expence, to wit, at *Ware* aforesaid. The request by the plaintiff to the defendant to deliver the residue of the hay was laid in the same manner in other similar counts.

And after judgment by default, and a writ of inquiry executed, it was moved, on a former day, to arrest the judgment, because the request was not specifically alleged with a venue, as it ought to be where a request in fact is necessary to give the plaintiff his cause of action; as it was contended to be in this case. For [361] which were cited *Peck* v. *Methold* (*a*), and *Back* v. *Owen* (*b*).

Espinasse now shewed cause. As to the first count, it alleges a sale of the hay to the plaintiff, and that the defendant delivered one load of it, but would not suffer the plaintiff to take away the residue, *but sold and disposed of it to other persons:* which is a sufficient breach of the contract, without alleging any specific request to deliver it, supposing the request were not formally alleged in this case. [Lord *Ellenborough* C. J. There is clearly a sufficient breach laid in that count; for by the defendant's selling and disposing of the rest of the hay to other persons, he disqualified himself from delivering it to the plaintiff; and therefore no request was necessary. The question then turns on the second count.] There is a specific allegation in the second count, that the plaintiff did request of the defendant to deliver to and suffer him to take away the hay. But even if that were informally laid for want of a particular venue; yet as the count states a complete contract of sale, and that the defendant, after delivery of a part, did not nor would deliver to or permit the plaintiff to take away the residue; that is sufficient, without alleging any request; which after a sale was not necessary to be made in order to vest the property in the plaintiff. And he referred to *Lowe* v. *Kirby* (*c*) that where a precise request ought to be, and is alleged, but without any venue, and non assumpsit pleaded, which is found for the plaintiff, it is sufficient: so this is cured by the statutes of jeofails *(d)*, being after judgment by [362] default and inquisition.

(*a*) 3 *Bulstr.* 297. (*b*) 5 *Term Rep.* 409. (*c*) *W. Jon.* 56.
(*d*) The stat. 4 *Ann. c.* 16. *s.* 2. for the amendment of the law, extends to judgments by default and writs of inquiry executed thereon, which, it says,

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Cowley, in support of the rule, relied on the cases before mentioned, to shew that where any thing is promised to be done, *upon request*, it is necessary in an action for a breach of the promise to allege *with a venue* a special request made: for the want of which allegation the judgment was reserved on error, in *Peck* v. *Method* (*a*), and in *Hayes* v. *Warren* (*b*). The same objection prevailed on general demurrer in *Bach* v. *Owen* (*c*), which was since the st. 4 *Ann. c.* 16. for the amendment of the law; and both in that case, and in *Wallis* v. *Scott* (*d*), it was held that the general averment, that the defendant had not paid the money, or done the thing promised, *although requested so to do*, is not sufficient, without a special request laid. And he denied that this defect was aided by the statute of *Anne* or any of the statutes of jeofails, being after judgment by default and a writ of enquiry executed: the statute of *Anne* extending (*e*) to protect judgments by default against such objections only as are remedied after a verdict by the statutes of jeofails, and not against such as are cured by a verdict at common law. But, where, as in this case, [363] the promise depends upon the doing of something by him to whom the promise is made, the omitting to aver the doing of that thing, which would be cured by a verdict at common law, is a fatal objection after judgment by default; as was held in *Collins* v. *Gibbs* (*f*); where Lord *Mansfield* said, that an objection by a defendant, in arrest of judgment by default, was exactly the same as if it had arisen on demurrer. And here the omitting to give a venue to the allegation of the request is the same as if no request had been laid, according to the cases before cited.

Lord ELLENBOROUGH C. J. It appears to me that the second count is sufficient to sustain judgment for the plaintiff, as well as the first. The question comes now to be considered by us after the stat. 4 *Ann. c.* 16. for the amendment of the law, the first section of which enacts "that in all cases where any demurrer shall be joined, &c. the Judges shall proceed and give judgment *according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission,*

shall not be stayed or reversed for any defect which by former statutes of jeofails would have been cured by verdict. And vide the several defects in pleadings which are cured by the statutes of jeofails, 1 *Saund.* 228. note 1. by Mr. Serjt. *Williams*.

(*a*) 3 *Bulstr.* 207.
(*b*) 2 *Stra.* 933.
(*c*) 5 *Term Rep.* 509.
(*d*) 1 *Stra.* 88.
(*e*) Vide Mr. Serjt *Williams*'s note to *Stennel* v. *Hogg*, 1 *Saund.* 228.
(*f*) 2 *Burr.* 899.

or

or defect in any writ, &c. declaration, or other pleading, &c. except those only which the party demurring shall specially and particularly set down and express as cause of demurrer: notwithstanding that such imperfection, omission, or defect, might theretofore have been taken for matter of substance, and not aided by the stat. 27 *Eliz. c.* 5.: so as sufficient matter appear in the said pleadings upon which the Court may give judgment *according to the very right of the cause.*" Now it is admitted, according to what was said by Lord *Mansfield* in *Collins* v. *Gibbs*, that this being a motion in arrest of judgment is to be considered exactly the same as if the question had arisen on general demurrer. Then what does the statute say upon the subject: after specifying the want of several matters of form, of which no advantage or exception shall be taken, it proceeds to say that "the Court shall give judgment *according to the very right of the cause as aforesaid*, without regarding any such imperfections, omissions, or defects, *or any other matter of like nature*, except the same shall be specifically and particularly set down and shewn for cause of demurrer." Now is not the omission to repeat a venue (for it must be always remembered that there is one venue well laid in the declaration), a less material omission than the want of alleging prout patet per recordum, where a record is pleaded; which is one of the instances specified where the omission shall not be taken advantage of without being specially shewn as cause of demurrer; for that is an omission to refer to that by which alone the allegation is to be proved: but here the omission is of that which is mere form. It is said that a request must be alleged: and so it is: but then it is said that is not duly alleged: the imperfection however consists only in the want of a time and place, where a venue was before laid; an omission by no means of equal importance with several of those instanced in the statute. The case of *Bach* v. *Owen* is relied on, as having been decided on this objection since the statute; where Mr. Justice *Buller* said, "that the want of a request was a substantial defect in the declaration, and that where it was necessary to allege a special request, the general words, *though often requested*, would not answer the purpose." There was no judgment however in that case; but leave was given to amend: and the cases referred to in the margin of the report, if cited by him as supporting that position, are all before the statute of *Anne*. Another case was cited of *Wallis* v. *Scott*, which came on upon general demurrer subsequent to that statute; but there judgment was ultimately given for the plaintiff when the Court was full. And though one of the Judges in

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in the first instance threw out an opinion, that where a request was by law necessary, (which he thought it was not in that intance), the general averment would not be sufficient, but it must be particularly set forth, that the Court might judge whether it were sufficient: yet it is to be observed, that the healing operation of the statute of *Anne* was not presented to the consideration of the Court. Nor was it so in the case of *Bach* v. *Owen*; for if it had, I think the objection there must have been overruled; because it was not only an objection of *like* nature, but of less force than several of those stated in the statute. In this case there is an allegation of a request, which it is admitted would be sufficient if time and place were laid with it; and I am of opinion that the want of those since the statute is not a sufficient objection in arrest of judgment.

GROSE J. declared himself of the same opinion.

LE BLANC J. A request is stated in the second count; and the only question is, whether the omission of assigning time and place to that request be matter of substance or of form? There is a venue laid in the count: and as to the time and place of the request, if stated, it would not be necessary to prove them. The true principle of venues is well stated in *Ilderton* v. *Ilderton* (*a*), in C. B.; and, according to the doctrine there laid down, the general venue would have drawn after it all transitory matters stated in the declaration. Clearly therefore the want of alleging time and place to the request is only matter of form, and is not sufficient to arrest the judgment.

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BAYLEY J. of the same opinion.

Rule discharged.

(*a*) 2 *H. Blac.* 161, 2.

Saturday, Nov. 26th.

PAXTON and Others *against* Sir HOME POPHAM and Another.

After judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined.

THE declaration consisted of several counts in debt, some upon specialties, and others upon simple contracts. To the former the defendants pleaded non est factum and certain special

special pleas: to the latter, nil debent. The plaintiff demurred to the special pleas, and the defendants had judgment thereupon (*a*). And on the pleas of non est factum and nil debent issues were joined: and the plaintiffs not having proceeded to trial on these issues, judgment, as in case of nonsuit, was moved for: which was opposed by

Burrough, on the ground that a plaintiff can only be nonsuited on the whole record; and since the statute 4 *Ann. c.* 16. allowing double pleading, where there has been final judgment entered for a defendant on part of the record, which can only be when the plaintiff is in court, it is incongruous afterwards to enter a judgment of nonsuit, which goes to the whole record, and assumes the plaintiff to be out of court. Now the judgment on the [367] demurrers is a final judgment; the defendant having judgment for his costs by stat. 8 & 9 *W.* 3., *c.* 11.; and after that the plaintiff cannot be nonsuited. *Bro.* tit. *Nonsuit, pl.* 31. which cites 14 *H.* 8. 23, 24. and *Co. Lit.* 139. *b.*

Holroyd denied that there would be any incongruity, where judgment is for the defendant upon some of the pleas, and after that he is suffered to depart without day. At common law, even after a verdict for the plaintiff, if a day were given him on continuance, and he did not appear, he might be nonsuited; which was remedied by the stat. 2 *H.* 4. *c.* 7.; and so it continued after that statute upon demurrer in law joined. *Co. Lit.* 139. *b.* Here the judgment of the Court on the demurrers was an interlocutory judgment, that the special pleas were good; but the Court will not give final judgment till all the pleas are disposed of. For till the final judgment the parties have day by the roll, as it is said in *Metcalf*'s case. And it is there said to have been held in 1 *H.* 7. 2. *b.* "that if the defendant be adjudged to account, and they are at issue before auditors, and the inquest be ready to pass, and the plaintiff make default; *now shall the plaintiff be nonsuit*, and shall not be received after," &c. "And this is not like other actions where the plaintiff has once judgment to recover." Now here a day was given after the judgment on the demurrers for the defendants to appear and try the issues; and they not appearing at the day must be nonsuited. The judgment on the demurrers to the pleas to the special counts is not that [368] the defendants shall recover their costs; but that as to the matters in those counts the defendants shall go without day.

(*a*) 9 *East*, 408, 424.

(*a*) 11 *Rep.* 40.

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PAXTON *against* POPHAM.

The Court said they would consider of it: and two days afterwards.

Lord ELLENBOROUGH C. J. delivered their opinion. The question in this case is, Whether it be competent to the Court to give judgment as in case of a nonsuit in the situation in which the cause now stands? The declaration consisted of several counts in debt; some upon specialties, and others upon simple contract demands. To the specialties the defendants pleaded non est factum, and certain special pleas; and to the others they pleaded nil debent. The plaintiffs demurred to the special pleas, and upon those demurrers the defendants had judgment. Upon the non est factum and nil debet issues are joined; and the plaintiffs now contend, that as there is a judgment upon the record in favour of the defendants, a judgment of nonsuit cannot legally be entered against them. We are of opinion however that it may. A nonsuit is a judgment against the plaintiffs for not appearing on a day when they are demandable. These defendants have already obtained a judgment, that as to part of the demand they may go thereof without day: and if the plaintiffs do not choose to appear to prosecute the residue of their suit when called upon by the defendants for that purpose, what incongruity will it introduce upon the record to enter a judgment of nonsuit against them, or what right have they to complain of it? They have a further day given them in court to prosecute the residue of their suit; and if they do not appear when demanded at that day, how is it inconsistent with the former judgment, (of the defendants' going quit as to part without day), to record that the plaintiffs, although solemnly demanded, came not, but made default; and to adjudge thereupon that the defendants shall go without day as to the residue also? We are therefore of opinion that we have power to give judgment of nonsuit, and consequently that this rule should be made absolute.

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O'KELLY

O'KELLY *against* SPARKES, in Error.

Saturday, Nov. 26th.

SCIRE Facias was brought by the defendant in error upon a judgment in C. B. against *O'Kelly* for 1260*l.* upon a bond dated the 20th of *December* 1800, with a condition, reciting that by indenture of the same date between *S. Chiffney* and *Sparkes*, reciting a grant of an annuity by his R. H. the Prince of *Wales* to *Chiffney* of 210*l.* during the life of his R. H. payable by the treasurer of his privy purse on the four quarterly days therein mentioned, *Chiffney* in consideration of 1260*l.* had with the consent of his R. H. assigned the said annuity to *Sparkes;* and that it was agreed between the parties that *O'Kelly* should give further additional security for the payment of the annuity by giving the bond in question; the condition of the bond was, *that if his R. H., or the treasurer of his privy purse for the time being, or any other person for his R. H., or O'Kelly, his heirs, &c.* should pay to *Sparkes* the annuity on the quarterly days mentioned, *the bond should be void, &c. The declaration then suggested the issuing of the writ on the 22d of *April* in the 45 *G.* 3. on which judgment was obtained for a breach of the condition of the bond before, (which was satisfied), and that after judgment recovered in *E.* 46 *G.* 3. *Sparkes* sued out his writ of scire facias on it, suggesting another breach in non-payment of the annuity, &c.: and then suggested for further breach, that though his R. H. was still living, *neither his R. H. nor the treasurer of his privy purse, &c. nor any other person, &c., nor the defendant* O'Kelly, had paid the annuity, &c.; and that 105*l.* for two quarters was due to *Sparkes* on the 5th of *October* 1806; for which he prayed execution, &c. To this *O'Kelly* pleaded in C. B. as to 52*l.* 10*s.* the first quarterly payment, that it accrued to the plaintiff *Sparkes* after the 5th of *July* 1795, viz. on the 5th of *June* 1806; and that the plaintiff then being a creditor of, and claiming to have the said demand against his R. H., did not deliver a particular in writing of the said demand, containing the nature and amount of it, and signed by the plaintiff, to the treasurer or principal officer of his R. H. at any time within ten days after the expiration of

The Prince of *Wales* having granted an annuity for his own life, payable by the treasurer of his privy purse, which annuity was assigned by the grantee to another, with the Prince's assent; and a surety having given bond to the assignee of the annuity, conditioned to pay it, *if the Prince, or the treasurer of his privy purse, or any other person for the Prince,* did not pay it at the respective quarter days: held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer as required in all cases within the stat. 35 *Geo.* 3. *c.* 125, *s.* 7. on pain of being foreclosed of such demand; whatever eqitable claim might be founded by the surety on such neglect.

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the quarter of a year in which such demand accrued, according to the stat. 35 *Geo.* 3. *c.* 125: and so pleaded the like plea to the second quarterly payment. The plaintiff replied as to the first plea, that at the time when the first quarterly payment of the annuity accrued to him, he was not, nor has he at any time since been a creditor of his R. H. for the said 52*l.* 10*s.*, or any part thereof, nor did he then have or claim, nor hath at any time since had or claimed to have any debt or demand against his R. H. for the said sum, &c. And the same to the second plea.

[371] To which the defendant demurred, and assigned for special causes, that the plaintiff has not by his replication confessed and avoided or denied the matter stated in the first plea; but that it is an argumentative answer, and a departure from the declaration, inasmuch as the declaration states that the 105*l.* arrears of the annuity had not been paid by his R. H. or any other person for him to the plaintiff, to whom it is stated to be due, and for which his R. H. as grantor is liable; and the plaintiff says in his replication that he was not a creditor of his R. H. nor had any claim on him for the arrears; and it appears by the declaration that his R. H. is indebted to the plaintiff in the said 105*l.* for the said two quarterly payments. On this demurrer the Court of C. B. gave judgment (*a*) for the plaintiff; and the defendant brought error, and assigned the common errors. The case was argued in this Court in last *Trinity* term.

Bowen for the plaintiff in error contended, that taking the whole condition together, it appeared to have been the intention of the parties that *O'Kelly* should only be called upon to pay the annuity in default of the Prince of *Wales*, and of his treasurer appointed under the act of the 35 *Geo.* 3. *c.* 125. for the payment of all demands on his R. H. out of the fund appropriated for that purpose: and this appeared by the recital in the condition of the original grant of the annuity to *Chiffney payable by the treasurer of his R. H.'s privy purse*, the *consent* of the Prince to the assignment of it to *Sparkes*, and the agreement that *O'Kelly* should give *further additional* security for the payment of it. The first part of the condition restrains the generality of the latter

[372] part; and the obligee was bound to shew that he had done every thing required by the act to obtain payment out of the fund originally made liable for this demand before he could resort to the further additional security of *O'Kelly*. In construing deeds the rule is, that subsequent clauses which are general shall be go-

(*a*) Vide 2 *New Rep.* 421.

verned

verned by precedent clauses which are more particular. *Thomas* v. *Howel* (*a*), recognized in 3 *Bac. Abr.* 393. *Grants.* J., and Lord *Arlington* v. *Merrick* (*b*). And where the extent of the surety's undertaking is doubtful, the words are always construed strictly in his favour. *Stratton* v. *Rastall* (*c*). This is an attempt to treat the surety as the principal debtor, against the manifest intent of the obligation. 2dly, The surety cannot be liable if the principal be discharged. And by *s.* 7. of the act every creditor whose demand accrued after the first quarterly day of payment of the Prince's revenue shall deliver into the treasurer's office a particular in writing of the nature and amount of such demand, signed by him, within ten days after the expiration of the quarter in which such demand accrued. And if any person having or claiming any debt or demand against the heir apparent shall not deliver in such particular in writing of it within the time specified, it is declared to be barred both in law and equity: and all bonds and other securities, the particulars of which are not so delivered in, are declared null and void to all intents and purposes. It is incumbent therefore upon a party, setting up any claim for a debt against the heir apparent, to shew that the requisites of the act have been complied with, without which no such debt can exist by law. [*Wigley*, contrà, suggested that it did not appear when the original grant was made to *Chiffney;* [373] it might have been before the act.] The date of the assignment to *Sparkes* was after the act, and therefore he ought to have delivered in the demand. The Court will only look to the party actually entitled to receive the annuity; and *Sparkes* is now the legal creditor of his R. H., as it seems now to be understood (*d*) that an annuity is assignable, especially if made so by express words; and as it is stated to have been assigned by the plaintiff in his declaration, it must be taken most strongly against him that it was assignable. So the Court will take notice of the party beneficially interested in a bond; as in *Bottomley* v. *Brooke* (*e*), *Rudge* v. *Birch* (*f*); and in other contracts, as in *Howel* v.

(*a*) 4 *Mod.* 69. (*b*) 2 *Saund.* 414. (*c*) 2 *Term Rep.* 366.

(*d*) He referred to *Co. Lit.* 144. *b.* and Mr. *Hargrave's* note thereon, referring to 2 *Vin. Abr.* 515. 3 *Vin. Abr.* 151. *Gerrard* v. *Boden, Hetl.* 80. *Perk. s.* 101. and *Maund's* case. 7. *Rep.* 28. *b.*

(*e*) *M.* 22. *G.* 3. *C. B.* cited in *Winch* v. *Keeley,* 1 *Term Rep.* 621. Sed vide *Baurman* v. *Radenius,* 7 *Term Rep.* 663. and *Scholey* v. *Mearns,* 7 *East,* 148.

(*f*) *M.* 25 *G.* 3. *B. R.* cited in 1 *Term,* 622.

M'Ivers

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M'Ivers (*a*). He also argued that the replication was a departure from the declaration, for the reason before assigned as special cause of demurrer; and cited *Praed* v. *The Duchess of Cumberland* (*b*).

Wigley contrà. The act of the 35 *Geo.* 3. does not bear upon this question; or, if it do, still the surety is not discharged as the case now stands. 1st, This annuity is made payable out of the privy purse of his R. H., to which the surplus, if any, of every quarter's revenue is to be paid over by the act, and on which the general provisions of the act do not attach: for it would be nugatory to give in to the treasurer a particular of a demand which he is not required to pay. The act did not mean to restrain the bounty of the heir apparent out of the fund provided for his own personal expences. But if demands on this fund be within the act, the original grantee, and not the assignee of the annuity, was the proper person to make the demand. 2dly, This was not a debt for which the prince was personally liable or could be sued. It is a mere direction to the treasurer of his privy purse to pay the annuity out of a particular fund; and in default of such payment, from whatever cause, the surety became liable immediately. And even though the principal should be discharged, there is nothing to prevent the surety from covenanting at all events for the payment of the debt: as one may bind himself or covenant for a minor, or feme covert, who would not be bound. And here, for aught appears, the surety may have bound himself after the demand of the grantee was forfeited for non-compliance with the act. He might engage to pay that which the principal was not bound to pay. Then the averment that the plaintiff was not a creditor of his R. H. at the time when the quarterly payment of the annuity accrued, (by which must be understood, not a creditor upon the face of the record), is no departure from, nor inconsistent with the declaration; because though the annuity were a voluntary one, as to the principal, still the surety may bind himself for the payment at all events if the principal did not.

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Bowen, in reply, relied principally on this, that it appeared by the record that the Prince of *Wales* was once liable (for he was not less liable because the annuity was directed to be paid by his treasurer out of his privy purse, as where a man promises to pay a bill at his banker's) for this demand, until he was discharged by the plaintiff's neglect in not making the demand of it

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(*a*) 4 *Term Rep.* 690. (*b*) *Ib.* 585.

required

required by the act; and therefore it appeared that the principal was discharged by the plaintiff's own neglect; which would discharge the surety.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was a writ of error brought upon a judgment of the Court of *C. P.* in a scire facias on a bond of the defendant in the penal sum of 1260*l.* [After stating the record, his Lordship proceeded—] The apparent difficulty in this case has arisen from confounding two subjects which have no necessary connection with and dependence upon each other, viz. the right and means which the grantee of the annuity, or his assignee, may have to compel payment thereof from the funds of the principal, (in this case the Prince of *Wales*;) and the right and means of compelling payment from the obligor in a surety-bond given, as this is, by way of an additional security for the payment of that annuity: which latter must of course depend upon the very terms of such additional security-bond, from which they are derived, and not upon the terms in which the principal had bound himself to his immediate obligee, nor upon the means of reimbursement which may eventually be had against such principal upon the ground of his own obligation. The bond of the defendant, on which this action is brought, is conditioned for the payment of an annuity of 210*l.* described as granted by his R. H. the Prince of *Wales*, during his, the Prince's life, to *Samuel Chiffney*, payable by the treasurer of his R. H.'s privy purse on four quarterly days of payment, viz. 5th of *January*, 5th of *April*, 5th of *June*, and the 5th of *October*. The condition of the bond now in question runs thus: "That if his R. H *George* Prince of *Wales*, *or* the treasurer of his privy purse for the time being, *or* any other person "for his said R. H., *or* the said plaintiff in error, (*O'Kelly*,) "his heirs, executors, or administrators, did and should well "and truly pay or cause to be paid to the defendant in error, "(*Sparkes*,) his executors, administrators, or assigns, during the "natural life of his R. H. the Prince of *Wales*, an annuity or "clear yearly sum of 210*l.*, by four equal quarterly payments, at "or upon the 5th of *January*, the 5th of *April*, the 5th of *June*, "and the 5th of *October* in every year; the first quarterly pay-"ment thereof to be made on the 5th of *January* next ensuing "the date of the said writing obligatory; then the said bond to "be void; otherwise "to remain in force," &c. The condi-

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tion of the bond therefore contemplates three other modes and sources of payment of the annuity, besides that to which alone the grant of it by the Prince of *Wales* refers; viz. payment by the treasurer of his R. H.'s privy purse. If it should remain unpaid by all the four several descriptions of persons, referred to by the condition of the bond as the possible paymasters of it, for one quarter day, the bond on the expiration of that day becomes forfeited, and the right to sue upon it accrues at the same instant; and of course does not remain in abeyance and suspended during the ten days after the expiration of the quarter within which the particular in writing of the demand ought to be delivered to the treasurer of his R. H., in order to found a demand upon
[377] the funds of his R. H. under the stat. 35 *Geo.* 3. *c.* 107. *s.* 7. If a right in the obligee to sue upon the bond be, as no doubt it was, fully vested by the lapse of a quarter day without payment of a quarter's annuity; can it be argued that it is capable of being divested in favour of the obligor by a subsequent neglect of the obligee to deliver a particular of demand, or to do any other act by which the obligor might mediately or immediately have acquired the means of future reimbursement as against the funds of his R. H.? Whatever equitable claim may be founded on such circumstances, and to what extent such claim may be made available, it is sufficient in a court of law to say that absolute legal rights of suit once fully vested and accrued by the breach of a condition of a bond are not at law thus defeasible. No case of the sort has been suggested in argument, nor I believe is any such to be found in our books. The plea therefore of the plaintiff in error, pleaded in bar of execution for the two quarters' annuity, on the ground of the original plaintiff's right to the same being defeated by such subsequent neglect, is insufficient and cannot be sustained at law. And if so, without considering the matter of the replication, and even assuming it to be liable to all the defects pointed out as special causes of demurrer, the plaintiff will, such replication notwithstanding, be entitled to recover the demand made by his declaration; such declaration being sufficient in point of law, and not answered by a sufficient plea on the part of the defendant. The judgment therefore which has been given in the Court of C. P. for the defendant in error must be affirmed.

HUNTER

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HUNTER *against* PRINSEP and Others.

Saturday, Nov. 25th.

Where in a charter-party freight was to be paid at so much per ton, *on a right and true delivery of the homeward-bound cargo,* from *Honduras Bay* to *London;* and the ship and cargo, after capture and recapture, having been wrecked at *St. Kitt's,* into which they were carried by the recaptors, a sale of the cargo was directed by the Vice Admiralty Court there, on the application of the master acting bonâ fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship-owners. —Held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro ratâ itineris. For such form of action for the proceeds of an illegal sale of goods is only a waver of any claim for *damages* for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt, which admits of a set-off, &c.) but does not recognize the right of the vendor so to convert the goods. And here the act of conversion, (for such it must be taken to be) being made by the master, who is the general agent of the ship-owners; and not, as in *Baillie* v. *Modigliani,* by the act of a Court of competent jurisdiction; was unlawful, and discharged the claim of the ship-owners for freight pro ratâ itineris.

But the plaintiff could not recover against the ship-owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves.

IN assumpsit, the plaintiff declared in the two first counts against the defendants, as owners of the ship *Young Nicholas,* for not delivering mahogany and logwood, loaded on board that ship, in the bay of *Honduras,* upon freight for *London,* agreeably to the terms of the different bills of lading which had been signed for such goods by the master: but having before the goods arrived at *London,* without the plaintiff's consent and against his will, sold them, and converted the produce to their own use. The first count stated the promise to have been, to carry the goods on board the ship from *Honduras* to *London,* and there deliver them to the plaintiff; the dangers of the seas only excepted. The second count stated the exception to have been of the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever. The third count stated a delivery by the plaintiff to the defendants of 500 logs of mahogany and 100 tons of logwood; and that they, having sold and disposed of them, promised to render to the plaintiff a just and reasonable account of the sale and proceeds, but * had refused to do so. The other counts were for goods sold and delivered, for money had and received, and upon an account stated. The defendants pleaded the general issue, and gave a notice of set-off, in the common form, for freight, work and labour, and money paid. At the trial at *Guildhall* a verdict was found for the plaintiff, subject to the opinion of the Court on the following facts: the damages (if any) to be settled by arbitration according to that opinion.

On the 3d of *September* 1803 a charter-party of affreightment under seal, was entered into and executed by the defendants, being owners of the ship *Young Nicholas,* and the plaintiff, as

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freighter of her, on a voyage from *Falmouth* to *Honduras Bay*, to fetch back from thence for the plaintiff a cargo of mahogany, with 60 tons of dye wood and logwood or fustick, to be delivered at *London;* the dangers of the seas and other unavoidable casualties always excepted. And by the terms of such charter-party the freight was stipulated and covenanted to be paid by the plaintiff to the defendants, in the following manner, viz. That the freighter should pay to the owners freight for the said cargo at the rate of 12*l.* 12*s.* per ton for mahogany, and for logwood or fustick at the rate of 8*l.* 8*s.* per ton of 20 cwt. at the king's beam, with 1*s.* 6*d.* per ton, in lieu of port charges and pilotage, besides the primage therein specified: such freight, &c. to be paid as follows; to wit, one third part on a right and true delivery of the said homeward-bound cargo, and the remaining two third parts thereof by an accepted bill or bills on the freighter, payable at three months date from such delivery. And the parties reciprocally bound themselves by such charter-party to each other for the performance of the covenants and agreements con-
[380] tained in it, in a penalty of 8000*l.* The ship proceeded to *Honduras Bay*, where a cargo of mahogany and logwood, amounting to above 200,000 feet, was loaded by the plaintiff on board the ship for *London;* and bills of lading for different parcels, with such different exceptions as are stated in the different counts of the declaration, were signed by the master of the ship for the delivery of such goods to the plaintiff, paying the before-mentioned freight for the same. The ship thus loaded, and having no other goods on board her, sailed from the bay of *Honduras*, on her homeward voyage on the 29th of *March* 1804; and on the 21st of *April* following was so damaged in a storm as necessarily to put into *Savannah* in *Georgia* to repair: and the master (who was employed by the defendants) sold a part of the mahogany there to pay for the necessary repairs of the ship; but the general average on that occasion has been adjusted and settled between the parties. On the 8th of *July* in the same year the ship, having been refitted again, put to sea with the remainder of her cargo in the further prosecution of her homeward voyage; but on the next day was captured by a *French* privateer, and carried towards *Guadaloupe*. On the 6th of *August* following she was re-captured off that island by one of his majesty's sloops of war, and sent to *St. Kitt's;* where on the 5th of *September* following she was driven ashore in a hurricane and wrecked; but the then remaining cargo was saved. The wreck and cargo were by order

of

of the Vice-Admiralty Court at *St. Kitt's* put up to public sale, without the privity or consent of the plaintiff or defendants; except only as such consent may be involved in the fact of the master of the *Young Nicholas* having applied for the said order; he acting on that occasion according to the best of his judgment for the benefit of all parties concerned. The cargo produced [381] (after paying 1-8th of the proceeds to the recaptors for salvage) 1776*l.* 19*s.* 10*d.* The ship netted about 200*l.*; and the proceeds of both were remitted to and received by the defendants. And this action is brought to recover the proceeds of the goods sold at *St. Kitt's* and remitted to the defendants, who insist on retaining the whole thereof on account of freight, which they allege to be due pro ratâ itineris. The plaintiff, on the contrary, insists, that he is entitled to recover the value of the goods sold at *St. Kitt's*, without any allowance for freight. The questions for the opinion of the Court were, Whether any freight were payable to the defendants, in respect of the cargo sold at *St. Kitt's?* If any freight were payable for the goods sold at *St. Kitt's*, Whether such freight were to be calculated on the proportion of the voyage actually performed in point of time, or distance, or only on the proportionate diminution of expence between the rate of freight from *Honduras* to *London*, and the rate of freight from *St. Kitt's* to *London?* and also, Whether freight were to be allowed on the quantity of goods so sold, or only in the proportion their neat proceeds, when sold, bear to their prime cost on board, or to what they would have neated if delivered at *London?* It was mutually agreed, that when the rule had been given by the Court, the result should be settled by the arbitration of *William Ludlam* of *Lloyd's* Coffee-house, *London*, merchant, in conformity to such rule.

Marryat, for the plaintiff, contended that no freight at all was payable in respect of the part of the cargo which was wrecked and sold at *St. Kitt's*, and remitted to the defendants. There is great difficulty in collecting from the books any rule for ascer- [382] taining in what cases freight is due pro ratâ itineris; but there is no case of rateable freight established except where the owner of the goods has, in consequence of the misfortune which has impeded the due course of the voyage, prevented the ship owner from forwarding them to the place of their destination by disposing of them himself; or else where some new agreement has been expressly made, or is to be inferred from the circumstances, for the apportionment of the freight. But nothing of the kind is

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here found. In the case of *Luke* v. *Lyde* (*a*), where assumpsit was brought by the ship owner for the freight, the goods were to be conveyed from *Newfoundland* to *Lisbon*, and were captured when within four days sail of *Lisbon*, and afterwards recaptured and carried into *Biddeford* in *Devonshire*, where the merchant agreed to accept his goods, without requiring the master to send them on to *Lisbon;* but on the contrary altered the port of their destination and sent them to *Bilboa* in another vessel: on which the master recovered pro ratâ itineris. The circumstances of that case might furnish a ground for an implied agreement by the merchant to pay freight pro ratâ rather than suffer the master to forward the goods by another conveyance to *Lisbon*, when *Bilboa* was considered to be the better market. But at least the merchant had the option to accept or abandon his goods; whereas here the plaintiff had no option; but the master has made an election for him, without his consent. In the subsequent case, however, of *Cook* v. *Jennings* (*b*); though the merchant accepted his goods at an intermediate place in the course of the voyage [383] where the vessel was wrecked, yet he was held not to be liable for freight pro ratâ. And though that were an action of covenant on the charter-party, on which some reliance was had, as distinguishing that case from *Luke* v. *Lyde:* yet the Court in general agreed that where there was an express contract for the freight, it mattered not whether it were with or without a seal. Here the special counts state express contracts, which are verified by the facts found: and the other facts stated exclude the presumption of any new agreement. [Lord *Ellenborough* C. J. An argument, I presume, will be urged against you founded on the nature of the action of assumpsit for money had and received, whereby it will be said that you have waved the tort and ratified the contract of sale, and must therefore take it with its consequences. What do you say to that?] There is no case where a party has been held to wave a tort, unless he had an option of suing either for the tort or upon the simple contract. In *Smith* v. *Hodson* (*c*) the plaintiff might have brought trover; but here there has been no wrongful conversion. But if the circumstances of the case shew a wrongful act in the master, like the tortious sale of goods by a carrier of his own accord, then as the contracts, and the breaches of them, are included in the special

(*a*) 2 *Burr.* 882. and 1 *Black Rep.* 190. (*b*) *Term Rep.* 381.
(*c*) 4 *Term Rep.* 211.

counts,

counts, which are framed upon the terms of the bills of lading, they are as much in disaffirmance of the act of the master as if the action had been laid in trover. He then argued on the second point respecting the mode of estimating the proportion of freight, if any, to be paid pro ratâ; which he said should be calculated according to the beneficial advancement of the voyage for the service of the owner of the goods; and consequently freight can only be due from *Honduras* to *St. Kitt's*. And this should be computed on the salvage value, which was the rule adopted in *Luke* v. *Lyde;* and not on the tonnage, which was stipulated for by the charter-party on the supposition of a delivery at *London*. For if the defendants be entitled to any freight, it must be on an implied new contract, on which they could only demand what is equitable. Coals may be shipped at *Shields* for *London*, and after arriving near to the destined port, may be driven back and wrecked at *Newcastle*, where they would be worth nothing in advance of the original price, and the freight may be worth more than the value. It may be different where the owner agrees to accept his goods at an intermediate place in the voyage.

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Richardson, for the defendants, contended that the special counts could not be supported, and that the true question arose upon the count for money had and received. The action is against the owners of the ship, and it is found that they contracted with the plaintiff for the carriage of the goods under seal; therefore the terms of the contract cannot be altered, nor can they be bound by the master having signed bills of lading; though the latter would be liable in respect of his contract; as would the owners by implication, in respect of the act of their authorized agent, if they were not under an express contract of a higher nature. Besides, no breach is laid in the special counts for which the defendants are liable; for the failure of the voyage was occasioned by the perils of the sea, namely, the storm; though even capture has been held *(a)* to be a peril of the sea; especially within the meaning of such an instrument as a bill of lading. Taking the case then on the general count, freight pro ratâ itineris peracti is payable wherever a voyage is in part performed, and the completion of it is prevented without the fault of the owner or master, and where the freighter takes to the cargo or to such part of it as is saved. This was decided in *Lutwidge* v. *Gray* *(b)* from whence it appears that if the master offer to carry on the

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(a) *Pickering* v. *Barkley*, 2 *Roll. Abr.* 248. and *Styl.* 132.

(b) *Dom. Proc. Feb.* 1733, *Abbott* on Merchant Ships, 3d edit. 298.

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cargo to its port of discharge in another vessel, and the freighter refuse, the other shall have his full freight: and though he make no such offer, he shall have freight pro ratâ. In these cases the master is considered as the general agent for all parties. *Luke* v. *Lyde* (*a*) is express on the same point; though there the defendant received his goods from the receptors, and not from the master; and though he had no benefit, but rather loss, from the carrying of his goods to *Bideford:* the freight being higher from thence to *Lisbon*, than from *Newfoundland*, where the goods had been originally shipped. So in *Mackrell* v. *Simon (b)*, where the voyage was from *London* to *Canada* and back again, Lord *Mansfield* says, "If the ship be cast away on the coast of *England*, and never arrive at *London*; yet if the goods be saved, freight shall be paid, because the merchant receives advantage from the voyage." And *Baillie* v. *Modigliani* (*c*) is to the same effect. The principle of these cases is not contradicted, but rather confirmed, by *Cook* v. *Jennings* (*d*), and was admitted by Lord C. J. *Eyre*, in *Curling* v. *Long* (*e*), and by Lord *Ellenborough*, in *Molloy* v. *Backer* (*f*). Then the acceptance of proceeds by the plaintiff in this case is equivalent to the receipt of the goods in the former cases; as appears from *Roccus de navibus et naulo*, note 81.; which was recognized in *Baillie* v. *Modigliani*, where the goods were sold, as in this case, without the concurrence of the owner, but by the direction of the Court of Prize in *France*, before the restoration was decreed; and yet Lord *Mansfield* was of opinion that the owner could not take to the proceeds without payment of freight pro ratâ. Here the ship and goods were carried upon the recapture into *St. Kitt's*, where the Court of Vice-Admiralty had authority to award the sale of them for payment of the salvage. Then though the master be the general agent of the ship-owners, yet in case of extraordinary calamity he must also be considered as the agent of the owner of the goods, who has entrusted them to his care, so as to bind him. In no respect can it be considered as a tortious act of the master, nor any excess of his authority, which arises out of the necessity of the case, and upon the exercise of a sound discretion for the benefit of the owner. But if there were any doubt of that, the bringing the action of assumpsit for money had and received to

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(*a*) 2 *Burr.* 882.
(*b*) *K. B. Trin.* 16 *Geo* 3. *Abbott*, 316.
(*c*) *K. B. Hil.* 25 *Geo.* 3. *Park*, 53,
(*d*) 7 *Term Rep.* 381.
(*e*) 1 *Bos*, and *Pull.* 634,
(*f*) 5 *East*, 316.

recover

recover the proceeds of the sale is a confirmation of the sale. In *Smith and others, Assignees of Lewis and Potter*, v. *Hodgson* (*a*), the bankrupt had no authority on the eve of his bankruptcy to sell the goods to a creditor, with a view of giving him a preference; but the assignees having brought assumpsit for goods sold and delivered, the form of the action was held to be an affirmance of the contract of sale, so as to entitle the creditor to set-off his debt. Next, as to the proportion of the voyage for which freight is due; *St. Kitt's* must be admitted, upon the [387] authority of *Roccus* (*b*) in the place before cited, to be the point to which freight is to be paid; being the place "quo mercedes inventæ sint:" and that is according to the justice of the case. But such freight is payable upon the quantity of the goods conveyed thither, without regard to their value. This was expressly so held in *Lutwidge* v. *Gray*, and in *Luke* v. *Lyde;* and, is confirmed by the general principle, that freight is not affected by the good or bad state of the cargo. In *Lutwidge* v. *Gray*, the tobacco was in so bad a state, that it was even found necessary to burn a part of it: and in *Luke* v. *Lyde* (*c*) Lord *Mansfield* said, "It is nothing to the master of the ship whether the goods are spoiled or not: provided the freighter takes them: it is enough if the master has carried them; for by so doing he has earned his freight." He afterwards says that the freighter must abandon all or take all: he cannot pick and choose. "It is quite immaterial (he adds,) what the merchant makes of the goods afterwards; for the master has nothing at all to do with the goodness or badness of the market." This essentially applies to a case like the present, where the freight was agreed to be paid by the tonnage.

Marryat, in reply, observed that the plaintiff here had exercised no option as to the taking of his goods at *St. Kitt's*; but they had been sold, and the money remitted to the defendants, before he had any opportunity of interposing and judging for himself: and this distinguished the present from all the former cases, except *Baillie* v. *Modigliani*, where the opinion quoted was not the point in judgment. In *Lutwidge* v. *Gray* the goods [388] had arrived at their destined port, to which they had been forwarded, before they were burnt; and they were then destroyed, in order to avoid paying the duty for them. But if freight be due at all on equitable principles pro ratâ itineris, it is a rateable freight only which ought to be paid for a rateable voyage: and if, when the goods are delivered, they be worth

(*a*) 4 *Term Rep.* 211. (*b*) Vide 2 *Burr.* 889.
(*c*) *Ib.* 887.

nothing

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nothing in equity, nothing ought to be paid for them. The passage in *Roccus* does not specify what proportion is to be paid; and in the absence of any express authority, it ought to be measured by the benefit received by the owner of the goods. Then the form of the action, however it may limit the amount of the plaintiff's demand to the actual proceeds of the sale received by the defendants; and though, as in *Smith* v. *Hodson*, it may let in a set-off by the defendant; cannot amount to a recognition of an authority to sell the goods. In *Kitchen* v. *Campbell* (*a*) it was considered that the legality of the defendant's execution against the bankrupt's goods, after he had committed an act of bankruptcy, was triable either in trover for the value of the goods, or in assumpsit for the proceeds of the sale made by the sheriff, and paid over to the defendant.

The case stood over for a few days: and now

Lord ELLENBOROUGH C. J. delivered judgment.—This case, which was argued on *Tuesday* last, stood over, rather for the purpose of our looking into some of the cases cited, particularly that of *Baillie* v. *Modigliani*, *Park* 53., than from any doubt
[389] which the Court entertained upon the main points of the case now in question. It will be recollected that it was an action of assumpsit, brought by the plaintiff, a shipper of goods on board the ship *Young Nicholas*, of which the defendants were owners. The parties had mutually contracted by a charter-party of affreightment under seal executed between them, for a voyage from *Falmouth* to *Honduras Bay*. The defendants were to fetch back from thence for the plaintiff a cargo of mahogany, logwood, &c. to be delivered at *London*, "the dangers of the seas and other unavoidable casualties always excepted." By the charter-party the freight was stipulated to be paid in particular modes and proportions *on a right and true delivery of the same homeward-bound cargo*. This *right and true delivery* of the homeward-bound cargo at the port of its destination never took place: as the ship, after taking in such cargo at the Bay of *Honduras*, was first damaged by a storm, and driven into *Savannah* in *Georgia* to repair: was afterwards, in the further course of her voyage, captured by a *French* privateer; then recaptured by a king's ship and sent into *St. Kitt's*, where she was driven on shore in a hurricane and wrecked; but the remainder of the cargo (of which part had been before sold at *Savannah* for the expence of repairs) was saved; and upon the application of the captain

(*a*) 3 *Wils.* 303.

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to the Court of Vice-Admiralty at *St. Kitt's* for an order for that purpose, was, together with the wreck of the ship, there sold, without the privity or consent of the plaintiff, or of the defendants. The cargo upon such sale neated, after payment of 1-8th salvage to the re-captors, 1776*l.* 19*s.* 10*d.*, which was, together with the proceeds of the ship, remitted to and received by the defendants. The action was brought by the plaintiff to recover these proceeds of the cargo sold at *St. Kitt's* from the [390] defendants, who had so received them. The defendants insisted upon retaining the whole of such proceeds on account of freight, to which they claimed to be entitled pro ratâ itineris. The plaintiff insisted upon his right to recover the whole of these proceeds, without making to the defendants any allowance for freight. The declaration in which this recovery was sought contained three special counts in assumpsit, founded two of them upon two bills of lading signed by the master, containing the first of them an exception of "the dangers of the seas;" the second, "of the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, navigation," &c. Upon these two special counts the plaintiffs clearly could not recover; both because they contained an express exception for the very perils by which the loss of the voyage was occasioned; and also because the plaintiff, having contracted with the defendants by charter-party under seal, could not charge the defendants in respect to the same subject-matter in virtue of a contract not under seal, and signed by their master only and not by themselves.

As to the 3d count, whether the law would imply any such promise to account for the proceeds of a cargo, wrongfully sold and converted, upon the ground of such conversion only, as is therein stated, is the less material to be considered, as the same merits on the part of the plaintiff are open for discussion on the count for money had and received, and upon which count the question between the parties distinctly arises; which is, whether the defendants have a lien upon and can claim to deduct their freight pro ratâ itineris out of the proceeds of the cargo sold at *St. Kitt's*, and which are now in their hands. It was contended [391] on the part of the defendants, that the money for which the goods sold is a substitution for, and properly represents, the goods themselves; and that as the defendants would, if the goods had subsisted in specie, have had a lien upon them for their freight, and would be entitled to have carried them if they could in the same ship, or to have hired another for that purpose, and

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so as to have earned their full freight: or, if the plaintiff had taken them out of their hands before the voyage was completed, would have been entitled to have claimed freight pro ratâ itineris against him; so, now, the plaintiff, having sued for the proceeds in this form of action "for money had and received," has, in virtue of his so suing, adopted and confirmed the act of the master, by which the goods were converted into money, by which the further conveyance of them in the course of the voyage was prevented, and by which of course the full freight of them was prevented from being earned. But the fallacy of the argument on the part of the defendants appears to us to consist in attributing more effect to the mere form of this action, than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than wave any complaint, with a view to damages, of the tortious act by which the goods were converted into money; and takes to the neat proceeds of the sale as the value of the goods, subject of course to all the consequences of considering the demand in question as a *debt*, and, amongst others, to that of the defendants' having a right of set-off, if they should happen to have any counter demand against the plaintiff. But we have been much pressed with the authority of the case of *Baillie* v. *Modigliani*, as supposed to be similar to the present; and in

[392] which Lord *Mansfield* is stated to have said, "In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was due pro ratâ itineris." This however, as every other proposition laid down by a Judge, ought to be understood with particular reference to the facts of the case then before the Court. That was the case of a ship sailing with goods from *Nevis* to *Bristol*, which was captured in the course of the voyage, carried into *France*, and condemned there: but the sentence of condemnation was afterwards reversed, and restitution awarded. The ship and cargo had however in the mean time been sold: but the proceeds of the sale had been paid, as it should seem from the note, to the owner of the goods, deducting the charges of the appeal: and the owner of the goods had out of the money paid the owner of the ship freight pro ratâ itineris. Of this payment of freight the owner of goods claimed the reimbursement from his underwriters upon a policy on goods: but it was properly answered on the part of the defendant, and the Court held accordingly, that the insurer on *goods* was not liable to have the charge of *freight* thrown upon him, because he had not engaged to indemnify against it: and this was sufficient for

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for the decision of the only question then directly in judgment before the Court. But it appears from the note of that case that Lord *Mansfield* did in that case further hold that freight pro ratâ itineris was a charge upon the proceeds of the goods sold in the hands of the owner of the goods to whom those proceeds had been rendered in lieu of his goods. But in what case, and under what circumstances, did Lord *Mansfield* so hold? Was it in the case of tortious unauthorized sale, as the one now in question must be taken to have been; particularly since the late case of *Reid* v. *Darby* (*a*) decided in this court in *Trinity* term last? [393] Or in a case in which the competency of jurisdiction of the several courts which condemned and restored was unquestionable: where if the ship and goods had been restored in specie, the right of the ship-owner to earn full freight, by carrying the goods to the delivering port, was entire; and where the possibility of doing so had only been prevented by the act of the Court or its officers, in making sale of the goods pending the suit, and by no fault on the part of the owner of the ship? And however just it may be that a substitution of money for goods, made by the authority of a competent tribunal, shall be equivalent to the actual restitution of the goods themselves, as far as respects all interests in and liens upon that fund; and however reasonable it may be that an owner thus taking the substitute, which requires no further conveyance, should be considered as virtually dispensing with the further duty of the ship-owners, which would have remained to be performed if the goods had still continued in specie; yet, no such dispensation with the duty of further conveyance on the part of the owner of the goods can be implied in a case like the present, in which the further conveyance of them is rendered impossible by an act of the immediate agent of the ship owners themselves, to which he, the owner of the goods, is neither actually nor virtually consenting by himself, or any agent empowered to consent on his behalf; and to which he is not compelled to submit by any regular exercise of legal authority in any quarter whatsoever; and from which he can, according to what is contended for on the part of the defendants, derive no benefit whatever; [394] inasmuch as the pro ratâ freight claimed by them exceeds the whole amount of the proceeds of the goods sold. Upon this view of the case of *Baillie* v. *Modigliani*, compared with the present, it affords no authority adverse to the claims made by the plaintiff in the present action. The principles which appear to

(*a*) *Ante*, 143.

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govern the present action are these: the ship owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties: and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight: but it was only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay any thing. If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship-owner will not forward them, the freighter is entitled to them without paying any thing. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order

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for selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight. The postea must therefore be delivered to the plaintiff.

Saturday, Nov. 26th.

The KING *against* The Inhabitants of WOBURN.

A rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another, touching the settlement of a pauper, although the nominal parties be the churchwardens and overseers of the poor of the respective parishes; and being as such party directly interested in the event of that proceeding, he cannot be compelled to give evidence by the adverse parish, even since the stat. 46 *Geo.* 3. *c.* 37., not being within the words of that law.

UPON an appeal by the churchwardens and overseers of the poor of the parish of *St. Alban* in the county of *Hertford* against an order of justices for the removal of *Mary Brown*,

widow,

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widow, and her children, from the parish of *Woburn* in the county of *Bedford* to *St. Alban*, *John Hilliard*, an inhabitant of the appellants' parish of *St. Alban*, and rated and paying to the poor's rates of the said parish, was called as a witness on the part of the respondents, and refused to give evidence. The Sessions were of opinion that the said *John Hilliard* was not compellable to give evidence, and quashed the said order; subject to the opinion of this Court on the point.

Topping and *Peckwell*, in support of the order of Sessions, contended, 1st, that the witness was privileged from giving evidence by being a party to the suit. 2dly, As being directly interested in the question, and therefore not within the act of the 46 *Geo.* 3. *c.* 37; but rather, if at all within the exception of that act, as exposing him to a penalty. First, Though the churchwardens and overseers of the poor are under different acts the representatives and trustees of the parish; yet they have no power to appeal against an order of removal, except as inhabitants: for the stat. 13 & 14 *Car.* 2. *c.* 12. *s.* 2. gives the appeal to "all such persons who shall think themselves aggrieved," &c.; and such persons are aggrieved, not as parish officers, but as inhabitants paying to the rates, out of which fund the expence of maintaining the pauper is to be borne, as well as the costs of the appeal. Therefore though the churchwardens and overseers may be the nominal, yet the inhabitants of the parish paying to the rates are the real parties to the suit: and that is further exemplified by the practice of entitling the cause after it is removed into this court, which is "the King against *the Inhabitants*," &c. The like consideration obtains in equity in all cases where parishioners are interested in a suit: they are considered as the real parties, though the churchwardens and overseers may be the nominal parties *(a)*. This differs from the case of a corporator *(b)*, who may be a witness in any cause in which the corporation are parties, if he be not personally interested in the result, but only in respect of the common corporate fund. Then if the witness called be a party to the suit, clearly he is not within the late statute. 2dly, Whether or not in form a party, the witness was immediately interested in the event of the suit. The costs of the appeal and the burthen of maintaining the pauper, if settled in the witness's parish, are charges on the rates, by which his quota may be increased. This has always been considered as interest

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(a) *Bridgman's Annal. Index to Chan. Rep.* passim.
(b) Vide *Peake's Evidence*, 149. 161.

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sufficient to exclude such an one from being called by his own parish *to give evidence for them; and must therefore be sufficient to protect him from being compelled to give evidence against himself. In this respect the case is very different from *Rex* v. *Little Lumley (a)*, where the parishioner, who was compelled to be examined as a witness for the adverse parish, was not rated at the time. It was not in the contemplation of the Legislature when they passed the act of the 46 *Geo.* 3. to compel one who was directly interested in the very question and suit in judgment to give testimony against his own interest. The very wording of the act shews that they looked to an interest in some other civil suit. They declare, "that a witness cannot by law refuse to "answer a question relevant to the matter in issue, the answering "of which has no tendency to accuse himself, or to *expose him* "*to penalty* or forfeiture of any nature whatsoever, by reason "*only*, or on the *sole* ground, that the answering of such ques- "tion *may* establish or *tend* to establish that he owes a debt, *or* "*is otherwise subject to* A *civil suit*, either at the instance of *his* "*majesty*, or of *any other* person or persons." If this case come within any of the words of the act, it is within the exception as exposing the witness to a *penalty;* for it subjects him to a distress, and to personal imprisonment *(b)* in default of sufficient distress: (and the question must depend on the witness's interest and situation at the time he was required to be examined:) but in no event could it subject him to a civil suit either at the instance of the king or of any other person. And these latter words sufficiently shew that the suit contemplated by the act was one to

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be afterwards instituted against the witness himself in consequence of the evidence he is compelled to give at the trial, and not the very suit in which the evidence was given. It never could have been made a doubt before the statute, but that a person who was directly interested in the result of the suit in judgment was not a competent witness in support of his interest, nor was compellable to be examined against it. Bills of discovery in equity were meant to supply the defect of the courts of law in this respect. There are cases in the books, such as *Title* v. *Greevett* (*c*), where it is said that a witness, though he may, shall not be compelled to give evidence which would subject him to a civil action. And there were many other decisions the other way. The statute however has now disposed of every such objection, upon which

(*a*) 6 *Term Rep.* 157.
(*b*) By stat. 43 *Eliz. c.* 2. *s.* 4.
(*c*) 2 *Ld. Ray.* 1008.

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alone any doubt could ever have been entertained before that time. [The case of *The King* v. *St Lawrence* in *Winchester* (*a*) having been referred to by the counsel for the respondents, as in point; where on a question of settlement between the parishes of *St. Maurice* and *St. Lawrence* in *Winchester*, a parishioner of the latter, who was rated to the poor there, was subpœned by the adverse parish, and compelled to give evidence against his own parish, notwithstanding his objection to it.] They answered, that it seemed as if the witness had at last waved his privilege; for the counsel in support of the order of Sessions there observed that the witness did not *persist* in refusing to give evidence: and Lord *Mansfield* only said that it was scandalous to *make* the objection; and that in cases of that kind it was reasonable that the truth of the facts should be fairly inquired into, *and that was a ready way to come at it:* a reason which would [399] equally apply to compelling a defendant on the record to give evidence against himself. And as to the case of *Cox* v. *Whalley* there referred to in a note, as one wherein the same objection had been overruled; they said it was certainly a mistake: as appeared by the following note of it; which was now read in court.

Cox v. *Whalley and others*, sittings at *Westminster* after *Mich.* 1779, before Lord *Mansfield* C. J. It was an action by the master of a tavern for a dinner provided by the joint order of eight persons, four of whom were made defendants in that action. The plaintiff called one of those who was not sued, to prove that the entertainment had been provided as stated. The witness himself objected that being a party, he ought not to be examined: and the objection was supported by the defendant's counsel. On the other side Mr. *Dunning*, for the plaintiff, said that it was competent for the plaintiff to examine any witnesses whose interest might incline them against him; although the witness might by his testimony charge himself. And Lord *Mansfield* disallowed the objection, and ordered the witness to be examined. He said that a person against whom a bill is filed for a discovery cannot demur to it on the ground of his having an interest against the party so calling him."

The Attorney-General and *Best* contrà. As to the question, whether or not the inhabitants of the parish were all parties to the suit? it must be decided by looking to the title of the appeal as it is entered at the sessions, where the question arose, on the objection taken, and not as the case is intitled when removed into

(*a*) *Burr. S. C.* 588.

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this *Court by certiorari, and there the churchwardens and overseers of the poor of the parish are the only parties to the suit known to that Court. And in a court of law none but those who are the actual parties to the suit on the record can be privileged as such from giving evidence when called by the adverse party, now that all objection on the score of giving evidence against their own civil interests is done away by the statute. Therefore there seems no reason why a cestui que trust in an action by or against his trustee may not be called as a witness by the adverse party. The case of *The King* v. *St. Lawrence* in *Winchester* (*a*) is an express authority to shew that a parishioner, though paying to the poor rates of one parish, may be called as a witness by an adverse parish litigating with the other a question on the settlement of a pauper. And so far as the technical objection goes to the calling a parishioner as a witness who, it is said, is in effect a party, the authority of that case is confirmed by *The King* v. *Little Lumley* (*b*): for in that view of the question it is immaterial whether the parishioner were actually rated at the time. If the Inhabitants of the parish, and not the churchwardens and overseers of the poor, be considered as the real parties to the suit, the only difference between one who is rated, and another who is omitted in the rate, is on account of his *interest;* which the statute has now removed. If, however, rated inhabitants are alone to be considered as parties to the suit, one consequence must follow, which has never hitherto been admitted in practice, that the declarations of any such inhabitants as to the matter in issue may be given in evidence by the adverse parish; for even the declaration of a mere trustee, being a nominal party on the record, was held in *Bauermon* v. *Radenius (c)* to be evidence against his cestui que trust. Taking him however to be an inhabitant, having rateable property in the parish, for which he is rated, and therefore as being consequentially interested in the decision of the appeal, still he is not in the same situation as a party to a suit. He is not bound to appear, nor to take any notice of the proceedings going on against his parish: the inhabitants may perhaps eventually be called upon for contribution to a rate, but no process lies to compel their appearance in court. So neither can the judgment affect him immediately. Suppose the pauper adjudged to be settled in the witness's parish and the parish refuse to receive or provide for him; the parish officers may be indicted, but not the witness as a mere parish-

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(*a*) *Burr.* S. C. 588. (*b*) 6 *Term Rep.* 15
(*c*) 7 *Term Rep.* 66

ioner.

ioner. He cannot be pursued by any process which can issue upon such a judgment, as a party to the suit may. The costs awarded cannot be levied upon him, but are only payable out of the general fund by the parish-officers, and they alone are answerable for the payment. The making of a rate by those officers, out of which the pecuniary charges of the costs, and of the future maintenance of the pauper settled upon them, are to be defrayed, is a matter altogether collateral to the judgment of the Sessions. Neither does it follow necessarily that the witness will be personally amesnable to the remedies given to enforce payment of the rate; for he may rid himself of any personal responsibility by removing out of the parish, though his property might be affected by it: but that objection goes merely to his interest, which is removed by the late act. At any rate the interest of such a witness in the question is very remote; and it would be a strange construction of the act to say that it shall not shelter one who has a direct interest in refusing to answer a question [402] which will certainly subject him to an action for a debt; but that it shall shelter one who has a more remote interest which can only be reached by a future collateral proceeding, which he may avoid altogether by removing from the parish. The exceptions in the act as to not compelling a witness to *accuse* himself of any offence or to subject himself to any *penalty or forfeiture*, can in no fair construction of the word *penalty*, as there used, be applied to the remedies given for collecting the poor-rate. And they urged the inconvenience which might ensue from holding that such a witness was not compellable to answer, (and which it was suggested had occurred in the particular case), if after giving evidence which prevented the removal to another parish, on the ground of a settlement in his own, the adverse parish should not be able to avail itself of that testimony when the removal was made upon that evidence to the witness's parish.

The Court said, that the question being of general consequence, as involving the construction of the late act, they would advise upon it before they delivered their opinion. And *Le Blanc* J. observed, that if the Sessions had been aware at the time of the extent of the question, there would have been no difficulty: for if the witness were rejected on the ground of his being a party to the suit, his declaration of any facts touching the matter in issue would necessarily have been evidence against him.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

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This Session's case was argued on *Wednesday* last, and the Court wished to consider, whether the very ungracious objection, made by a rated inhabitant of the *appealing parish, to be examined as a witness when called upon by the respondents, were well founded: and on consideration we are of opinion that that it was. The parties appealing before the court of quarter sessions, as appeared by the proceedings returned to this Court, were the churchwardens and overseers of the parish of *St. Alban;* which at first seemed to afford an answer to the objection, that the inhabitant proposed to be called was not a party to the proceeding: but in reality the appeal is by them on behalf of the inhabitants of the parish, who are all of them paying to the rates, the parties grieved, and are all directly and immediately interested in the event of the proceeding, by which the maintenance of the pauper is to be fixed on them or removed from them, as well as the costs. It is a long-established rule of evidence that a party to the suit cannot be called upon against his will by the opposite party to give evidence: and we think that the late act of the 46th of the king does not break in upon this rule. That act takes away the right of objecting by reason only, or on the sole ground that the answering the question may establish or tend to establish that the witness owes a debt, or is otherwise subject to a civil suit. But that is not the ground of the present objection: nor does it appear to us to have been the intention of the legislature by this act of parliament to alter the situation of parties to a suit or proceeding, more especially in a proceeding such as the present, where the situation of *Hilliard*, the person proposed to be examined, did not bring him within the words of the act, nor the inconvenience intended to be remedied by it. We therefore are of opinion that the Sessions have properly determined the party not to be compellable to give evidence. And that their order, quashing the order of the two justices, must be affirmed.

The KING *against* The Justices of WILTSHIRE.

Monday, Nov. 28th.

THIS was a rule calling on these justices to shew cause why a writ of mandamus should not issue, commanding them to enter continuances upon the appeal of the inhabitants of the parish of *Stourton* in *Wilts* against an order of removal of a certain pauper from *Mere* to *Stourton*, and to hear and determine the said appeal.

This was founded on an affidavit of the appellant's attorney, living at *Wincaunton* in *Somerset*, by which it appeared that he was applied to by the parish-officers of *Stourton*, on the 19th of *April* last, to enter the appeal and get it respited until the next sessions; in consequence of which notice of appeal and of the intended motion to respite was given to the respondents. That the next sessions was held on the 26th of *April*, when the appeal was entered and respited to the *Midsummer* sessions, which was held at *Warminster* on the 12th of *July*. On the 2d of *July* the appellant's attorney learnt for the first time that the Sessions had made certain rules for their practice, which were not published till after the *April* sessions, nor acted upon or officially circulated till the *Midsummer* sessions, by which it was required that on all trials of appeals the notice of trial was to be given on or before the *Monday* in the week next before the sessions, otherwise the notice to be deemed insufficient; *and that the like notice was to be given in the case of respited appeals*, unless, &c. That on *Tuesday* the 5th of *July* notice of trial of the appeal was served on the respondents at 6 o'clock in the morning, dated the day before, being as soon as the signatures of the parish-officers could be obtained. That the usual notice theretofore required in such cases in this and the neighbouring counties *was given in this case. That the appellant's attorney attended the *Midsummer* sessions on *Tuesday* the 12th of *July*, and on the next day the appeal was called on, when the respondents objected that the notice had not been given in time. That the appellants then applied to the Court for an adjournment under the circumstances, offering to pay the costs of the day; but the Court refused it, thinking they had no power to do so. Affidavits were also read in answer to

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former usual notice, this Court will grant a mandamus to the Sessions to enter continuances and hear the appeal.

Though an appeal against an order of removal has been entered and adjourned once by virtue of the stat. 9 *Geo.* 1. *c.* 7. *s.* 8., and though the justices in sessions have a discretionary power to determine whether reasonable notice has been given of the appellant's intention to proceed on the trial of such adjourned appeal; yet if they dismiss the appeal at such adjourned Sessions without hearing it, on the ground that they have no authority to try it for want of a sufficient length of notice to the respondents according to a new rule of practice promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney, who had given the

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this rule, alleging that the new order of practice was made at the preceding *January* sessions held at *Devizes;* and that notice of it was immediately after promulgated in the county. That the appellant's attorney lived only 5 miles from *Stourton,* though in the county of *Somerset;* and that the litigating parishes were very near to each other.

Garrow, R. Williams, and *Casberd,* shewed cause against the rule, and contended that the magistrates were the sole judges by the act of the 9 *Geo.* 1. *c.* 7. *s.* 8. of what was *reasonable* time for giving notice of appeal: and having laid down a rule for regulating their discretion, of which notice had been promulgated at two preceding sessions, all persons were bound to take notice of it; and that the appellant's thinking proper to employ an attorney, who happened to live just without the bounds of the county, could not differ the case. The act of the 13 and 14 *Car.* 2. *c.* 12. *s.* 2. first gave the appeal to the *next* sessions, which has been construed to be the next possible Sessions: after which the stat. 9 *Geo.* 1. *c.* 7. *s.* 8. directs that "if it shall appear to the justices that reasonable time of notice was not given, then they shall adjourn the appeal to the next quarter session, *and then and there finally determine the same.*" But this only empowers the justices to make one such adjournment upon the ground of
[406] the want of time for the appellants to give reasonable notice of their appeal; and having once before exercised that jurisdiction in the present instance, they had no authority to make a second adjournment on account of the same default. But if they had a continuing jurisdiction in that respect, yet as it could only be legally exercised if the justices were of opinion that in fact there had not been sufficient time before the Sessions to give reasonable notice of appeal to the respondent parish, and they being of opinion that reasonable notice might have been, but had not been given in the particular case, the question was thereby concluded, and this Court will not interfere to controul that judgment.

The Attorney-General, Jekyll, and *Grant,* in support of the rule, were stopped.

Lord ELLENBOROUGH C. J. The magistrates certainly had a discretion to exercise with respect to what was reasonable time for giving the notice of appeal; but we have also a kind of visitatorial jurisdiction over them, in the exercise of such a discretionary power; and we think that in this case they have not exercised that discretion in a way that we ought to give effect to: but that we ought to interfere and correct it. Here it appeared that a new rule of practice with respect to giving notice had been recently

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recently made by the Sessions, of which the appellant's attorney had no knowledge, but he conformed himself to the former practice; and under these circumstances it would be too much to conclude the appellants from having their case heard.

Per Curiam, Rule absolute (*a*).

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Monday, Nov. 28th.

BUTLER *against* BRUSHFIELD.

Bail in error is not necessary upon the stat. 3 *J.* 1. *c.* 8. in debt on bond conditioned for the payment of money, *and also for performing all covenants in a mortgage deed.*

MARRYAT shewed cause against a rule for setting aside an execution pending a writ of error: and the question was, whether bail in error (which had not been put in) were necessary? It was an action of debt upon a bond conditioned for payment of 1100*l.* at a certain day, and also for performing all covenants in a mortgage deed of even date with the bond; and he cited *Desbordes* v. *Horsey*, 2 *Stra.* 959., where the condition of the bond was for the payment of money on such a day, *being the same sum mentioned in certain indentures of such a date;* which latter words it was contended by the plaintiff in error excused him from giving bail, because the words of the stat. 3 *J.* 1. *c.* 8. are bonds *for payment of money only;* and that was a bond for performance of covenants: but the Court held that bail was necessary; the material part of the condition being the payment of the money; and the other words being only added to shew that they were only different securities for the same debt.

Lord ELLENBOROUGH C. J. There the bond was conditioned for payment of *money* only; but this is for performing all the covenants in the mortgage deed, amongst which there may be many covenants besides that for the payment of the money.

Per Curiam, Rule absolute (*b*).

(*a*) Though by the stat. 13 & 14 *Car.* 2. *c.* 12. the appeal was to be lodged at the *next* Quarter Sessions, yet when it was so lodged, the justices might have adjourned it toties quoties the purposes of justice required. Vide the case of *The King* v. *Lumley Parish*, 2 *Salk* 605. And there is nothing in the stat. 9 *Geo.* 1. to restrain their general power in this respect, but rather to compel the adjournment in the first instance where reasonable notice has not been given. Vide *The King* v. *The Justices of Buckinghamshire*, 3 *East*, 342. and *The King* v. *The Justices of Shropshire*, (by mistake printed *Staffordshire*,) 7 *East*, 549.

(*b*) Vide 2 *Bulstr.* 54. and *Carth.* 28.

The

Monday, Nov. 28th.

The KING *against* HUBBARD.

One in custody by attachment for non-payment of money under 20*l.* found due by an award made a rule of Court, is not entitled to his discharge under the stat. 48 *Geo.* 3. *c.* 123. that being confined to persons in execution *upon any judgment.*

THE defendant was in custody upon an attachment for non-payment of a sum under 20*l.* found due by an award which had been made a rule of Court; and *Peake* had obtained a rule for his discharge by virtue of the stat. 48 *Geo.* 3. *c.* 123., and cited *Rex* v. *Stokes* (*a*), where one in custody on an attachment for non-payment of costs under the stat. 5 & 6 *W. & M. c.* 11. *s.* 3. was discharged under the Lords' Act 32 *Geo.* 2. *c.* 28. *s.* 13., which extended relief to persons charged *in execution* for any sum not exceeding 100*l.* This rule was now resisted by *Jervis* and *Dampier*, on the ground that the act in question was worded differently from the Lords' Act, and was confined to relieve prisoners "in execution *upon any judgment*" for any debt or damages not exceeding 20*l.* &c. And, on adverting to the words of the statute, *The Court* were of opinion that it only extended to persons in execution on judgments; and discharged the rule.

(*a*) *Cowp.* 136.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

1809.

COURT OF KING'S BENCH,

IN

Hilary Term,

In the Forty-ninth Year of the Reign of GEORGE III.

WRIGHT, Clerk, *against* SMYTHIES, Clerk.

Tuesday, Jan. 24th.

THIS was an action brought by the present rector of *St. Michael's, Colchester*, against his predecessor, to recover damages for dilapidations of the rectory-house, and other buildings described. The declaration stated, as usual, the seisin by the plaintiff of the rectory and premises, and that the latter were in a ruinous state. The defendant let judgment go by default as to the rectory-house, and pleaded not guilty as to the residue of the grievance complained of. The property in dispute, consisting originally of a dwelling-house, a stable,* slaughter-house, and other premises, appeared at the trial to have been devised by one *Charles Saunders*, of *Colchester*, by will dated the 2d of *August*

Where successive rectors had been in possession of land for above 50 years past; but in an action for dilapidations brought by the present against the late rector, it appearing that the absolute seisin in fee of the same land was in certain

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devisees since the stat. 9 *Geo.* 2. c. 36. and that no conveyance was enrolled according to the 1st section of that act, nor any disposition of it made to any college, &c. according to the 4th section: held that no presumption could be made of any such conveyance enrolled, (which, if it existed, the party might have shewn), and consequently that the rector had no title to the land; as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed: although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in *Baliol College, Oxford.*

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WRIGHT, Clerk, *against* SMYTHIES, Clerk.

1754, in the following words: "I give and devise all that capital messuage or dwelling-house, with the stable, slaughter-house, yards, garden, and other appurtenances, now in the occupation of me and *S. N.* unto my friends *G. Wegge*, *C. Gray* Esq. and the Rev. *G. Kilby*, all of *Colchester*, their heirs and assigns for ever:" having before given an estate for life in the premises to his wife. The tenant for life and the three devisees in fee were proved to be dead. No trust was declared, nor any thing else contained in the will which could affect these premises, nor any residuary devise. But it appeared that *Kilby*, one of the devisees, was rector of this parish, and that he and all his successors, by connivance of the trustees, had let the premises to tenants for their own benefit. The advowson is in *Baliol College*, *Oxford*. On these facts *Macdonald* C. B. was inclined against the plaintiff's right to recover the damages for the dilapidation of the buildings in dispute; considering that though from the length of time that the successive rectors had been in the receipt of the rents of these premises, it would have been presumed, had nothing appeared to the contrary, that the property had been acquired to the rectory by some legal means; yet as the manner in which it had originally been acquired was shewn, it appeared that the fee was either in the heir of the surviving joint-tenant, or in the devisee or alienee of such survivor; or in the heir at law or devisee of the testator, if the devise were void as being made collusively to evade the statute of mortmain. However, the learned Judge permitted the inquiry to proceed as to the amount of these dilapidations, and a verdict was found for the plaintiff for 150*l.*
[411] the estimated amount of the dilapidation of the rectory-house; and leave was given to the plaintiff's counsel to move to add a further sum of , being the amount of the dilapidation in respect to the premises in question, if the Court should be of opinion that he was entitled to recover for those.

Nolan accordingly applied for a rule for that purpose in last *Michaelmas* term, and stated the objection made at the trial on the part of the defendant, as to the premises in dispute; that this was a void devise within the statutes of mortmain: to which it was answered that as the rectory belonged to *Baliol College*, it was within the saving of the 4th section of the stat. 9 *Geo.* 2. *c.* 36. which confirms dispositions of lands, &c. in trust for either of the two universities or the colleges thereof: for which the *Attorney General* v. *Tancred* (*a*) was cited. And it was con-

(*a*) *Ambl.* 351.

tended

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tended that as the successive rectors of the parish for above 50 years past had had possession of these premises, a conveyance, if necessary, would be presumed from the trustees to the use of the college; and that the plaintiff, the present rector, could not be supposed to be in possession of the title deeds of his patrons, so as to produce them in evidence. And he referred to *Griffin* v. *Stanhope* (*a*), where it was said in argument, and not denied, that "if a parson shew that for 200 years certain land was parcel of his glebe, it is not therefore of necessity that the other should produce a confirmation from the patron and ordinary; for the continuance of the possession makes it intendible to be according to law at the time it was made." So in *Crimes* v. *Smith* (*b*), though the original instrument of impropriation of a vicarage anno 22 *Ed.* 4., with condition that it should be endowed, was [412] shewn by the defendant, and that it never had been endowed, and therefore the impropriation was void; yet as during all the time a vicar had been presented, admitted, instituted, and inducted, as one rightfully endowed, it was resolved by all the Court that it should be presumed that the vicarage in respect of continuance was lawfully endowed.

Garrow and *Marryat* now shewed cause; and referred shortly to the learned Judge's report, as decisive of the question; the devise being absolute upon the face of it, and no proof of any conveyance enrolled having been made by the devisees or any of them to the rector and his successors, without which no title could be derived to them since the stat. 9 *Geo.* 2. *c.* 36. *s.* 1. and which if it existed, the plaintiff had necessarily the means of shewing. And that in the absence of such proof, the title being shewn to be out of the rectors since the statute, no presumption could be made in their favour in express contradiction to the provisions of the act.

The Court (in the absence of Lord *Ellenborough*, who was ill) were clearly of this opinion; and *Shepherd* Serjt., who was to have supported the rule, yielded to that opinon without arguing the case.

Rule discharged.

(*a*) *Cro. Jac.* 456. (*b*) 12 *Rep.* 4.

Tuesday, Jan. 24th.

SPURRIER *against* VALE.

In debt for a penalty, under the game laws, if the defendant shew a deputation as gamekeeper of the manor from the lord, it may be presumed if nothing appears to the contrary, that the game killed by him there was for the use of the lord under the st. 3 *G.* 1. *c.* 11.

IN debt for the penalty of 5*l.* given by the stats. 3 *G.* 1. *c.* 11. and 5 & 9 *Ann.* for using a gun and dog for killing game, it was proved at the trial that the defendant shot a pheasant on the 1st *October* 1807 in *Birchhanger* manor that he acted as a gardener, and lived in a house belonging to Mrs. *Hiphuff*. On the part of the defendant a regular deputation was proved from *New College* in *Oxford*, dated 28th of *March* 1805, and under their seal, appointing him their gamekeeper for *Birchhanger* manor, in the usual form, to kill game for their use. In answer to which it was objected, on the part of the plaintiff, that the defendant was not, according to the requisition of the statute, "truly and properly a servant of the lord of the manor." But the Ld. Chief Baron, before whom the cause was tried in *Essex*, overruled the objection; considering that if the words "truly and properly a servant" were to be construed to mean "*domestic* servant," corporations or individual lords of manors, having no domicile there to which their gamekeeper could be attached, would in many instances be deprived of the benefit of appointing such persons; and that the bonâ fide appointment of the defendant, as gamekeeper of a distant manor belonging to the college, satisfied the statute. It was next contended, that in order to protect the defendant, it was necessary that he should take and kill game for the sole use and immediate benefit of the lord. But, supposing that to be necessary, the learned Judge was of opinion that a gamekeeper regularly appointed, proved simply to have
[414] taken or killed game, was to be presumed to have so done according to law, (especially in an action on a penal statute,) until the contrary were proved: and there being no evidence in this case, that the defendant was killing game for the use of any person other than the lord of the manor, he advised the jury to find a verdict for the defendant; which they did accordingly.

In last *Michaelmas* term it was moved to set the verdict aside, on the ground of a misdirection in law; there being no evidence that the defendant, who was admitted not to be qualified suo jure, was either "truly and properly a servant of the lord," or "a person immediately employed and appointed to take and kill the game for the sole use or benefit of the lord." And the case

of

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SPURRIER *against* VALE.

of *Rogers* v. *Carter* (*a*) was referred to; where, though it was held that a lord of a manor might appoint an unqualified person, not a menial servant of his, to kill game; yet it seemed to be understood that the deputation must be confined to killing game for the lord's own immediate use: and though such a person was held to be protected from having his gun seized even off the manor; yet it was considered that he was liable to the penalty of killing game out of the bounds of his deputation. So here, it was necessary for the defendant to shew that the game was killed for the use of the college by which he was deputed; without which he subjected himself to the penalty.

In this term *Shepherd* Serjt. and *Burrough* were to have shewn cause against the rule; and *Garrow* and *Marryat* were heard in support of it. But

The Court (in the absence of Lord *Ellenborough* who was ill) said, that the defendant having been deputed gamekeeper by the lord of the manor, it might be presumed that the game was killed for the use of the lord, if nothing appeared in evidence to the contrary. [415]

Rule discharged.

(*a*) 2 *Wils.* 387. 390.

BOWDEN *against* VAUGHAN.

Wednesday Jan. 25th.

A representation to the underwriters at the time of effecting a policy by the owner of *goods* on board a ship, as to the time of her sailing, being made bonâ fide upon probable expectation, does not conclude him.

THIS was an action upon a policy of insurance on goods at and from *Lisbon* to *London*. Previous to the effecting of the insurance a letter had been received by the plaintiff from his correspondent, dated *Lisbon*, 27th of *October* 1807, in which the writer advises him that he had consigned to him 1828 hides by the *Almirante Nelson*, which were to be insured; stating that she was a *Portuguese* ship, *and would sail in a few days*. This letter was not shewn to the underwriters at the time of subscribing the policy; but the broker *represented that the ship was to sail in a few days:* and he said upon his examination at the trial at *Guildhall*, that if it had been represented that the ship was not to sail in less than a month, the insurance could not have been effected; the *French* army marching to the attack of *Portugal* being then daily expected at *Lisbon*. There was no doubt therefore, of the materiality

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BOWDEN *against* VAUGHAN.

materiality of the representation: and in fact the vessel did not sail till the 29th of *November*, and was stopped by the enemy on the 30th before she left the *Tagus*. Lord *Ellenborough* C. J. left the case to the jury; advising them to consider that the person by whom the representation was made was the owner of *goods*, who could only speak of the sailing of the vessel from probable expectation; and that if such representation were made bonâ fide, it should not conclude him. And the jury, being of opinion that the representation had been made bonâ fide on probable expectation, found a verdict for the plaintiff.

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Park now moved for a new trial, on the ground that no such distinction appeared in any of the cases, between a representation as to the time of sailing made by the owner of the goods, and one made by the ship-owner; and that the effect of it with respect to the underwriter was the same, whether it proceeded from the one or the other. But

The Court were of the same opinion with the Lord Chief Justice at the trial, that a representation as to the time of the ship's sailing, made by the owner of goods on board, must from the nature of the thing be considered only as a probable expectation, he having no control over the event.

Rule Refused.

Wednesday, Jan. 25th.

ROBERTSON and Another *against* LIDDELL, Bart.

After verdict for the defendant, and a new trial awarded upon a question of law, without any thing said as to costs; and instead of proceeding to a second trial, the parties agree to state the facts specially as if in a case reserved at the trial; on which the postea is afterwards delivered to the plaintiffs; they are entitled to the costs of the first trial.

THE principal point in this case having been decided with the plaintiffs in last *Easter* term (*a*), a question now arose as to the costs; on which the facts were, that the defendant had obtained a verdict at the trial, and the Court afterwards granted a rule for a new trial upon the matter of law; but instead of proceeding to trial a second time, it was agreed to put the facts into the shape of a special case; which was done accordingly: and after argument, the postea was awarded to be delivered to the plaintiffs.* And nothing having been said as to costs in the rule for the new trial, the master had taxed costs for the plaintiff, as if the special case had been originally reserved at the first trial. On

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(*a*) *Ante*, 9 vol. 487.

which

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which a rule nisi was obtained by *Hullock* for the master to review his taxation; contending that in no event could the defendant who had obtained a verdict be liable to the costs of the first trial; for the plaintiffs could not be in a better condition than if they had succeeded upon a new trial; in which event, according to *Mason* v. *Skurray (a)*, and *Hankey* v. *Smith* (*b*), they would not have been entitled to the costs of the first trial.

Carr opposed the rule. And

The Court approved of the master's taxation; saying, that the defendant had no cause to complain; for being in the wrong, he had only the costs of one trial to pay; whereas if the cause had gone down to trial a second time, he would have had his own costs of the first trial to have paid, and all the costs of the second trial, which would have been decided against him. That if he had conceded any favour to the plaintiffs in agreeing to the special case, instead of going to trial the second time, he should have made his bargain with them about the costs at the time of such agreement.

Rule discharged.

(*a*) *B. R. T.* 20. *G.* 3. *Hullock*, 395. (*b*) 3 *Term Rep.* 507.

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Wednesday, Jan. 25th.

THOMASON, jointly with HIPGIP, PEARSON, and HODGES, Assignees, under separate Commissions, of UNDERHILL and GUEST, Bankrupts, *against* FRERE and Others.

Two of three partners, affecting, but without au-

THOMASON, *Underhill* and *Guest* were partners in trade at *Birmingham;* to whom the defendants, bankers at the

thority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad without his privity, to a creditor at home, and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners, having in the mean time committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being at the time abroad. Held, 1st, that by such indorsement of the bill by the two after acts of bankruptcy committed by them, though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any control over the joint stock as partners, and therefore could not bind either the property of their assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, That such creditor could not set off a greater demand which he had upon the joint firm though represented by the different plaintiffs.

Sait

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THOMASON and HIPGIP and Others *against* FRERE.

same place, advanced money from time to time. On the 1st of *June* 1807 the balance due to the defendant was 1800*l.*, which was afterwards increased; and *Thomason*, being then resident at *Copenhagen*, where he has ever since continued, the defendants applied for security to *Underhill* and *Guest*; who thereupon *by deed* of that date, executed by them only, and without any authority from *Thomason*, but purporting to bind him also, assigned to the defendants certain scheduled debts due to the firm of *Thomason, Underhill*, and *Guest*, and amongst others a debt for 1450*l.* (the sum now in dispute) from *Gamble* and Co. in *America*. On the 3d of *October* 1807, *Underhill* and *Guest* received a letter of advice addressed to their firm from *Gamble* and Co. (who were ignorant of this assignment) desiring them to draw a bill on *Gamble* and Co.'s agents, *Dunlop* and Co. in *London* for the amount of their debt of 1450*l.*; which bill was accordingly [419] drawn at two months, and was accepted by *Dunlop* and Co. on the 8th of *October*, and returned to *Underhill* and *Guest* at *Birmingham;* and on the 11th *Guest*, with the assent of *Underhill*, indorsed and delivered it over to the defendants, who had applied for it, and they received payment of it on the 6th of *December*. On the 7th of *October* 1807, *Underhill* and *Guest* committed acts of bankruptcy; on the 19th separate commissions of bankrupt were taken out against them; and on the 26th they were declared bankrupts, and the plaintiffs (*Hipgip, Pearson*, and *Hodges*) were chosen their respective assignees. And those assignees joined with *Thomason*, the remaining solvent partner, to bring this action for money had and received, in order to recover back the said sum of 1450*l.* so paid to the defendants by *Underhill* and *Guest* after their bankruptcy, by virtue of the deed of assignment executed before by those two partners for themselves and their absent partner *Thomason*. And it further appeared that at the time of the bankruptcy, and at the trial of this cause, the partnership firm of *Thomason, Underhill*, and *Guest* was indebted to the defendants in a larger amount than 1450*l.* for which this action was brought. Under these circumstances, *Grose* J., before whom the cause was tried at *Warwick*, principally on the consideration that the partnership firm of *Thomason, Underhill*, and *Guest*, whose interests were represented by the respective plaintiffs, was indebted to the defendants in a larger sum than that sought to be recovered, nonsuited the plaintiffs. Whereupon a rule nisi was obtained in the last term for setting aside the nonsuit, and for a new trial.

It was now agreed on all hands, that *Underhill* and *Guest* had no

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no athority to bind their absent partner *Thomason* by deed; and that the bill having been indorsed and delivered to the defendants by the bankrupt partners, *after acts of bankruptcy committed by them, would not bind their assignees, whose title would relate back, so as to affect the shares of the two bankrupts. The remaining questions were then resolved into these; first, whether [*420] the payment of a partnership debt made by the two partners after acts of bankruptcy committed by them, but before any commission issued thereon, would bind the solvent partner abroad: and if not, 2dly, whether this action brought in the joint names of the solvent partner and the assignees of the others to recover the whole could be maintained, when, as against *Thomason* at least, the defendants were entitled to retain this money; and when the firm of *Thomason*, *Underhill*, and *Guest*, which still (it was said) remained solvent, and was represented by the several plaintiffs in this action, was now indebted to the defendants in more money than was sought to be recovered from them.

Clarke and *Reader* now opposed the rule. As to the first point; a secret act of bankruptcy, committed by one or more of several partners, however it may by relation divest the bankrupts of their property, as between them and their particular creditors, whose interests alone are regarded by the bankrupt laws, cannot operate as a dissolution of the partnership with respect to third persons dealing with the whole firm as solvent, until the public declaration of the bankruptcy by the commissioners and their assignment of the estate and effects of the bankrupt partners. In *Smith* v. *Stokes* (*a*) Lord *Kenyon* said, it was not the act of bankruptcy alone (by one of two partners) that dissolved the joint tenancy, but the act of bankruptcy followed up by the commission and assignment. And therefore the indorsement [421] and delivery of the bill in question, part of the partnership fund, made to the defendants by *Guest* and *Underhill*, before such declaration and assignment, though after acts of bankruptcy committed by them, bound *Thomason* their solvent partner; they appearing at that time in the eyes of the world as his partners, and as acting with his authority, and the creditors who dealt with them as partners having no notice of any thing done to dissolve the partnership. It is clear that after the acts of bankruptcy committed by the two, they would have been the agents of the other for the purpose of receiving payment of a debt due to the partnership; and by the same rule they must be taken as

(*a*) 1 *East*, 363.

his

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his accredited agents to pay out of his funds that which was justly due from him to the defendants. 2dly, If this were a good payment with respect to *one* of the plaintiffs, they cannot recover in a joint action, in which they must establish the right of *all* to recover the whole of that which is owing to *all*. A *joint* action cannot be maintained by these parties without affirming and shewing that it is a *partnership* demand; and then it must be admitted, that as against the partnership the defendants have a greater demand. The joint property of the partners is liable in the first instance to their joint debts, and the assignees of the bankrupts under separate commissions have no claim but to their shares of the surplus. The firm of the three partners being in legal contemplation still solvent, (no commission having issued against *Thomason)* he has a right to have the partnership effects applied in the first instance to the discharge of the partnership joint debts; but at any rate he cannot join in any action to recover back his own share which he was compellable to pay at the

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time. In *Smith* v. *Stokes (a)*, joint effects of two partners had come to the defendant's hands after an act of bankruptcy committed by one of them; and it was held that trover would not lie by the assignees of the bankrupt against the defendant who claimed under the solvent partner. The same point was ruled in *Smith* v. *Oriell (b)*, where the joint property was delivered to the creditor by the solvent partner in payment of a joint debt. And in *Smith* v. *Goddard* (*c*) the Court determined that the assignees of bankrupt partners, under a joint commission, could not recover in an action for money had and received, money which had been paid by a clerk in the house to a joint creditor after the bankruptcy of one, and before the bankruptcy of the other partner. Then if the payment would have been good as to the share of the partner who was solvent at the time, though he had afterwards become bankrupt, a fortiori if he continue solvent, it must be binding upon him. But further, the deed of assignment, though void against *Thomason*, would be binding in equity upon *Underhill* and *Guest*, who executed it before their bankruptcy; and therefore considering the bill as indorsed afterwards by virtue of the prior assignment, the assignees of the bankrupts standing in their place cannot maintain this equitable action to recover back even their two thirds.

Vaughan Serjt., *Rough* Serjt., *Morice*, and *Abbott*, in support of the rule, upon the first point, argued, that the partner-

(*a*) 1 *East*, 363. (*b*) *Ib.* 368.
(*c*) 3 *Bos. & Pull.* 465.

ship

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ship was dissolved by the acts of bankruptcy committed by two of the partners, followed up by the subsequent commissions and assignments, as from the time of such * acts of bankruptcy, by necessary operation of law vesting the property of the bankrupt partners in the assignees by relation back. And if the partnership were dissolved at that period, then no act done by *Underhill* and *Guest* could bind *Thomason;* but the indorsement and delivery of the bill to the defendants, made by the two partners after their bankruptcy, was the same as if done by mere strangers, both as against *Thomason*, who was never bound at all by the deed, and as against their assignees who had acquired a legal right to the debt due from *Gamble* and Co. before the acceptance and delivery over of their bill to the bankrupts, and consequently before the indorsement of it to the defendants. *Gamble* and Co. were no parties to the assignment of their debt to the defendants by the two partners before their bankruptcy, and were not therefore bound even in equity by that assignment; nor could *Underhill* and *Guest* after their bankruptcy diminish their own funds, except by such payments in the ordinary course of trade as are protected by the stat. 19 *Geo.* 2. *c.* 32. within which this cannot be ranged. All the cases cited, to which may be added *Fox* v. *Hanbury* (*a*), were dispositions of the joint effects made by a solvent partner. If a trader cannot dispose of his estate after an act of bankruptcy, as against his own assignees under a subsequent commission, because he was thereby devested of all property therein at the time by relation; the same reason must preclude him from disposing of the property of those who were in partnership with him, of which he must be equally devested! 12 *Mod.* 446. Then, 2dly, As to the form of the action; if *Thomason* were not bound by the deed executed by his partners without his authority before the bankruptcy, nor by their indorsement and delivery of the bill after their bankruptcy to the defendants; and if the operation of the bankrupt laws be to clothe the assignees of the bankrupts with all their rights as from the time of the act bankruptcy; the money which was due to the partnership must necessarily be considered as having been received by the defendants to the use of the solvent partner and the assignees of the other two, and consequently they may join in suing for it. In what proportion the money, when received, is to be divided, or how it is to be applied, can form no questions at law. It will certainly be applicable in the first instance to the payment of the joint creditors, and *Thomason* will not be entitled to any

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(*a*) *Coop.* 445.

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part of it unless there be a surplus after those debts are satisfied. The statutes of set-off do not apply to a case of this kind, where a payment has been made by bankrupts after an act of bankruptcy; and if the defendants be not entitled to set-off against all the plaintiffs, they cannot set-off against any. In *Dickson* v. *Evans* (*a*), the defendant, in an action by the assignees of a bankrupt for a debt due to the bankrupt's estate, was not allowed to set off cash notes issued by the bankrupt payable to bearer, bearing date before the bankruptcy, without shewing that they came to his hands before that event; for afterwards the bankrupt could not bind his estate: by the same rule he cannot pass any property in a bill by indorsemant after an act of bankruptcy. In *Ridout* v. *Brough* (*b*) it was held that a debt due from a bankrupt before his bankruptcy could not be set-off against a demand accruing in the time of the assignees; such as the receipt of money upon the bill indorsed to the defendants after the bankruptcy (*c*).

[425] GROSE J. (*d*). It struck me at the trial that the defendants, to whom the firm of *Thomason, Underhill,* and *Guest,* represented by the several plaintiffs in this action, was indebted in more money upon the balance of accounts than was sought to be recovered against them in this action, had a right to set-off their demand; but, from the arguments which have been adduced, I now think that if the contrary be not established, it is at least rendered so doubtful that there ought to be a new trial, in order to have the case more fully heard, and the questions, which are of consequence, more distinctly brought before the Court, either upon a special verdict or a case reserved.

LE BLANC J. I agree that the cause should go to a new trial. It requires further time and attention to separate the facts and the law; and if the defendants be so advised they may apply for a special verdict. As to the form of the action I have no doubt: two out of three partners commit separate acts of bankruptcy, and from that time the partnership property is by operation of law vested in the assignees of *Underhill,* and in the assignees of *Guest,* and in *Thomason* the other partner. After the acts of bankruptcy committed by *Underhill* and *Guest,* followed up as they were by commissions and assignments, they ceased to have any control or disposition over the joint property; and therefore

(*a*) 6 *Term Rep.* 57. (*b*) *Cowp.* 133.
(*c*) Vide *Marsh* v. *Chambers,* 2 *Stra.* 1234.
(*d*) Lord *Ellenborough* C. J. was indisposed and absent.

their

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their indorsement of the bill to the defendants, after such acts of bankruptcy, was made by persons having no authority to dispose in that manner of the partnership fund or property; and the present plaintiffs, in whom by operation of law the whole property *was vested from that time, are entitled to recover back the money received on the bill as money received to the use of *Thomason* and of the respective assignees. And then the question is, Whether the defendants can set off a demand which they have upon the three partners to a greater amount, against the claim for this money which was received by the defendants, not to the use of those partners, but to the use of *Thomason* and of the several assignees of *Underhill* and *Guest?* It appears to me at present that they cannot set it off; but the case should go to another trial in order to have it more solemnly considered. [*426]

BAYLEY J. I am of the same opinion. The defendants claim to retain this money under an indorsement, by *Guest* after his bankruptcy, of this bill which was drawn before by the firm on the correspondents of *Gamble* and Co. for a partnership debt. And I take it to be now clear that where one of several partners commits an act of bankruptcy, which is afterwards followed up by a commission and assignment, he has no longer any property in the partnership effects, but the property is from the time of such act of bankruptcy in his assignees by relation and in the solvent partners. The case of *Hague and Others, Assignees of Anne and Isaac Scott,* v. *Rolleston (a),* is an express authority upon this point. There one of two partners, after an act of bankruptcy committed by him, sent to a joint creditor a bill of parcels of goods which he had just before, unknown to the creditor, deposited in a warehouse in his name, and who immediately after the act of bankruptcy took possession of and sold the goods in part payment of his demand; and the other solvent partner having afterwards become bankrupt, the assignees under a joint commission against both brought their action of trover against the creditor, and recovered the whole value of the goods; on the ground that when they were delivered by the joint-trader who had committed the first act of bankruptcy, he was no longer to be considered as a partner so as to bind by his act the property of the other. So here, at the time of the indorsement of the bill, *Underhill* and *Guest* had no control over the partnership effects; and the defendants could not acquire the property in the bill from those who had no control over it. That begets the second [427]

(a) 4 *Burr.* 2174.

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question, Whether if persons wrongfully get possession of the property of others, they can, when sued for it, set off a prior demand upon the same parties in right of whom the action is brought? That must be determined by reference to the statutes of set-off: but those only apply to cases where there are mutual debts and credits. Now the defendants never could have sued *Thomason* and the assignees of *Underhill* and *Guest* for this debt; for their demand was against the partnership of *Thomason Underhill* and *Guest*. The case therefore is not within the words, nor is it within the spirit of the acts.

Rule absolute.

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Wednesday, Jan. 25th.

DOE, on the several Demises of ELIZABETH ANNE COX, and J. KAY, *against* DAY.

Under a power to demise for 21 years in possession, and not in reversion, a lease dated in fact on the 17*th of February* 1802, habendum from the 25th of March *next ensuing the date thereof*, is good if not executed and delivered till after the 25th of *March*; for it *then* takes effect as a lease in possession with reference back to the date actually expressed.

THIS was an ejectment, tried before *Lawrence* J. at *Gloucester*, to recover certain freehold and leasehold lands in the parishes of *Rodmarton* and *Supperton*, which *the defendant claimed under a lease made by *Charles Wesley Cox*, deceased, the father of *E. A. Cox*, who was entitled to recover the freehold, and *Kay*, her trustee, the leasehold, if the lease made by her father were not good.

By indentures of lease and release of the 8th and 9th of *July* 1790, in pursuance of an agreement made previous to the marriage of *C. W. Cox*, and *Anne* his wife, the freehold premises were limited to *Charles Cox*, the father, for life, remainder to *C. W. Cox*, the son, for life, remainder to his first and other sons in tail, remainder to his daughters in tail: with a power for the tenants for life to demise the premises for any term not exceeding 21 years in possession, and not in reversion, or by way of future use. And the leasehold, which was held under one of the prebendaries of *Salisbury*, was conveyed to trustees, on trust to permit the tenants for lives to receive the rents, and at their request to make underleases of the premises in like manner. *Charles Cox* being dead, a lease was drawn, *dated the* 17*th of February* 1802, purporting to be a demise from *C. W. Cox* to the defendant of the freehold and leasehold in question, *habendum from the* 25*th* of March *next ensuing the date hereof*, for 21 years, at the yearly rent of 800*l.*: but in consequence of some difference between

between *C. W. Cox* and the defendant, the lease was not executed by *C. W. Cox* till the 27th of *April* 1802. Whereupon the learned Judge directed the jury to find a verdict for the plaintiff for the whole of the premises, with liberty for the defendant to move the Court to confine the execution to the leasehold premises in case they should be of opinion that the lease, as to the freehold, did not take effect in reversion, or by way of future use; thinking that, as to the leasehold, the defendant had no right at law, inasmuch as at the time of making the demise the legal estate was not in *C. W. Cox*, but in his trustees.

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Doe ex dem. Cox *against* Day.

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Abbott accordingly moved in last *Michaelmas* term to have the verdict for the plaintiff entered for the premises included in the prebendal lease only; on the ground that the lease of the freehold only took effect from the execution and delivery of the deed; which being after the 25th of *March* 1802, to which the habendum referred, the demise would operate from a day then past, and not in reversion or by way of future use: and that the words of the habendum, "from the 25th of *March* next ensuing *the date hereof*," would refer to the actual date before mentioned, namely the 17*th of February* 1802, and not to the day of the delivery. The enrolment of a bargain and sale under the stat. 27 *H.* 8. *c.* 16. within six months is reckoned from the date, and not from the delivery of the deed. *Shep. Touch.* 221. And though, says Lord *Coke (a)*, where the indenture has a date, and is delivered after, it shall take effect to pass from the bargainer from the delivery; for then it became his deed; and not from the date: yet the deed must be enrolled within six months after the date. And in *Butler* v. *Fincher* (*b*), he said that if the lease (which was of a freehold, habendum from the day of the date,) had been delivered after the first day, it would clearly have been good. Then in *Clayton's* case (*c*) the distinction was taken between a demise *from henceforth*, which refers to the delivery of the indenture, and from *the date*, or *day of the date*, which shall be taken to be the actual date. And *Hedley* v. *Joans (d)* makes the same distinction between a release of all demands until *the making* of the release, and until the *date thereof*.

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Williams Serjt., *Puller*, and *Hall*, now opposed the rule. This is a lease under a power to demise in possession, and not in reversion; which is to be construed strictly; and here the lease upon the face of it purports to grant a future interest. It is no answer

(*a*) 2 *Inst.* 674.
(*b*) 2 *Bulstr.* 306.
(*c*) 5 *Rep*
(*d*) *Dy.* 307. *a.*

to

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to say that the deed not having been executed till after the 25th of *March* 1802, it did not take effect before; for if the day of the delivery be considered in law as the true date, the lease would still be reversionary, as the habendum from the 25th of *March next ensuing* the date would then refer to the 25th of *March* 1803. [*Le Blanc* J. That is assuming that the day of the *date* and the day of the *execution* of the lease mean the same thing.] It does not say from the *day of the date*, but from the *date*. The date of the deed is quite immaterial; it takes its effect only from the delivery. In *Pugh* v. *The Duke of Leeds* (*a*) Lord *Mansfield* said that the *date* of a deed means the *day of its delivery*. So in *Goddard's* case (*b*). And if the date be to be reckoned from the delivery for one purpose, it cannot be reckoned from a different time for another purpose. The authorities cited by the plaintiff's counsel went upon the construction of the particular words of the statute of enrolments.

Dauncey and *Abbott* contrà were stopped.

[431] Grose J. (*c*). We must construe the words of the instrument, if possible, ut res magis valeat quam pereat, according to the rule of construction laid down in *Pugh* v. *The Duke of Leeds*. Therefore though the lease took effect to pass the interest only from the delivery, which was not till the 25th of *March* next ensuing the date, yet the period of its commencement will then have reference back to the actual date; which will cure every objection.

Le Blanc J. This is a technical objection, in order to give effect to which we must insert in the instrument a constructive date, which will avoid it, in the place of an express date of the 25th of *March* 1802, the retaining of which will make it good with reference to the time of the actual execution of the lease on the 27th of *April* in the same year: but to put such a construction upon it would be contrary to all the authorities.

Bayley J. agreed; and added that what was said by Lord *Mansfield* in *Pugh* v. *The Duke of Leeds* was with reference to a case where the deed was delivered on the day of the date.

Rule absolute.

(*a*) *Cowp.* 720. (*b*) 2 *Rep.* 5.

(*c*) Lord *Ellenborough* was absent from indisposition.

KNILL *against* WILLIAMS.

Thursday, Jan. 26th.

THE plaintiff declared on a promissory note, dated *Hereford*, 1st *April* 1807, by which nine months after date the defendant promised to pay to the plaintiff, or order, 100*l.*, for value received *for the goodwill of the lease and trade of Mr.* F. Knill *deceased;* and also on the *common counts. At the trial before *Le Blanc* J. at *Hereford*, a stamped note was offered in evidence, corresponding in its terms with the note in the form declared on: but it appeared on the examination of the subscribing witness to the note, that the words in italics were added by consent of both parties the day after the note, the body of which was drawn by the witness, had been signed and delivered by the defendant to the plaintiff without any new stamp; and that the witness, who had drawn the note the day before in the presence and under the direction of both parties, was not instructed to insert those words at the time. Nor was there any evidence in the cause, from whence, (as the learned Judge observed when the matter was moved in this court,) it could have been left to the jury to collect that it was the intention of the parties, at the same time when the note was drawn, to have those words inserted: he therefore rejected the evidence: but allowed the plaintiff to go on with his case to see whether he could support his claim independent of the note; but he could not. And the defendant was also allowed to try whether he could impeach the consideration of the note; but he failed in that. So that the question was at last reduced to the validity of the note, whether receivable or not in evidence: on which the plaintiff was nonsuited, with liberty to move to set aside the nonsuit, and by consent to enter a verdict for the plaintiff for the amount of the note, if the Court should be of opinion that the note was receivable in evidence. This was accordingly moved in last *Michaelmas* term, and a rule granted for that purpose; against which

A promissory note for 100*l.* payable to the plaintiff or order, and originally expressed to be *for value received* generally, being altered the next day upon the suggestion of one of the parties by the addition of the words *for the good will of the lease and trade of Mr. F. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted and omitted by mistake.

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Dauncey and *Puller* now shewed cause, and contended that the additional words were material, because they confined the consideration for the note to the *good will and trade of* F. Knill; and it would have been a defence to have shewn that no such consideration was given: and that if the addition were material, it avoided the note in its original state; and the former stamp having done its office, there ought to have been a new stamp as for

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for a new note: for which they cited *Master* v. *Miller* (*a*), *Bowman* v. *Nichol* (*b*), and *Cardwell* v. *Martin*(*c*). And they distinguished this from *Kershaw* v. *Cox* (*d*), where a bill had been drawn by *Collier* on the 1st of *August* in favour of the defendant, who indorsed it to *Kershaw*, by whom it was returned to the defendant on the 2d, upon discovering that the words, "or order," were wanting; so that the bill could not be negotiated by indorsement; and the defendant referred the plaintiff to *Collier*, by whom the words were inserted on the 2d of *August*, and the bill returned to the plaintiff: and on the bill being afterwards refused acceptance, the defendant, on notice of that fact, insisted that it was a good bill and would be paid. There *Le Blanc* J. left it to the jury upon the fact of the defendants having immediately indorsed over the bill, and the other circumstances of the case, whether it were not the original intention of the parties to the bill to make it payable to *Cox or order*, and whether those words had not been at first omitted by mere mistake; which mistake was corrected as soon as it was discovered; and upon that ground the verdict passed. At any rate, they said, the plaintiff ought to have declared on the note in its original state, and could not recover on the count stating it as a note drawn with the additional words.

[434] *Abbott* and *Lord* in support of the rule said, that the only question was, whether the note were receivable in evidence, for if the alteration were immaterial, so as not to affect its validity, it being stated to be *for value received*, the plaintiff would be entitled to recover upon one or other of the counts. They then insisted that the alteration did not vary the legal effect of the note, but merely introduced the original consideration for which the note had been given; and therefore brought the case within the principle of *Kershaw* v. *Cox*, which was a stronger case than this, because there the alteration varied the legal effect of the instrument. If the stamp-acts be not in the way, no question can be made here as to the validity of the note between the parties on account of the alteration, which was made by their consent, and in conformity to the truth of the case: and no objection has ever been allowed upon the stamp-acts, unless the alteration has been such as to give the note or bill a new operation in some material respect, such as the date, the parties, the sum, or time of pay-

(*a*) 4 *Term Rep.* 320. 5 *Term Rep.* 367. and 2 *H. Blac.* 141.
(*b*) 5 *Term Rep.* 537. (*c*) 9 *East*, 190. and 1 *Campb. N. P. Cas.* 79.
(*d*) 3 *Esp. N. P. Cas.* 246.

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ment, making it in effect a different instrument. [Lord *Ellenborough* C. J. In *Kershaw* v. *Cox* the addition was allowed, because there was evidence that the added words were originally intended to have been inserted, and were omitted at the time by mere mistake? but here there was no evidence that the consideration for the note, though truly stated, was originally intended by the parties to have been inserted. *Le Blanc* J. The witness who was employed to draw the note said, that it was mentioned in conversation between the parties at the time what the note was given for; but he had no direction to draw the note in that form; but he was to draw it in the common way.] It was left to his discretion to draw the note in the form he thought best; [435] but when the attention of the parties was drawn to the form of it the next day, the witness was desired by them to add those words; which words described the consideration admitted by the witness to have been spoken of the day before. This was therefore sufficient evidence to have been left to the jury to find that such had been the original intention of the parties. [*Le Blanc J.* It appeared clearly that the addition of the words the next day was an after-thought of one of the parties.]

Lord ELLENBOROUGH C. J. The first inclination of one's mind is always to support an instrument where the transaction is fair; but when we find so material an alteration as this, made after the instrument has been issued, I do not know where we should stop if this could be sustained. If a bond, for example, were conditioned for the payment of money generally, could it afterwards be introduced by way of recital that the money had been advanced out of a particular fund; which might afterwards be made use of as evidence for other purposes. Now here the defendant *Williams* was originally liable on the note for *value received* generally, without specifying in what that value consisted; and the effect of the alteration is to narrow the value from value received in general to the value expressed; which I cannot say is not a material alteration. And this is not like the case of *Kershaw* v. *Cox*, where by mistake, as it appeared, the bill had not been drawn according to the intention of the parties at the time, and which was brought back the next day to the drawer to have the imperfect execution of it perfected. But this is a case where the note was originally drawn in the manner then agreed upon; and it afterwards occurred to one of the parties that the [436] particular account on which the note had been given should be inserted in it; and which was done the next day according to his desire.

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desire. This he might have required as evidence for him against the other party of the true consideration of the note; or if he wished to restrain its circulation at large, to put it upon those who took it to inquire whether that consideration had existed. The alteration was made on the following day; and if it might have been done then, there is no reason why it might not be done at any subsequent time: and if in this instance, it may be done in other instances. Such an alteration therefore cannot be admitted without a new stamp.

GROSE J. The question is, whether the alteration introduced made it a different note? if it be material, it is a different note: and it certainly is material; for it points out the goodwill and trade of *F. Knill* as the particular consideration for the note, and puts the holder upon inquiring whether that consideration had passed. The objection may press hard on the plaintiff, and one cannot but be sorry that the justice of the case as between these parties is defeated; but the very alteration shews that the parties themselves were not satisfied with the note in its original and general form, but the particular consideration was required to be pointed out. This made it another note, and required a new stamp; for want of which it could not be received in evidence.

LE BLANC J. If I had thought that there was any evidence on which the jury might have found that the words afterwards added had been originally intended to have been inserted, and
[437] were omitted by mistake, I should certainly have left it to them so to find; the case of *Kershaw* v. *Cox* being then perfectly fresh in my mind: but according to my recollection of the evidence, it was impossible for them to draw that conclusion from it. The opinion which I delivered in *Kershaw* v. *Cox* can only be supported on the ground that the alteration there made in the bill the day after it was negotiated was merely the correction of a mistake made by the drawer of it, in having omitted the words, "*or order,*" which it was intended at the time should be inserted; for the alteration there made was a very material one. But there was strong evidence in that case to shew that the omission of those words was by mistake; for it was intended to be a negotiable note, and was immediately afterwards indorsed as such; considering that it had been drawn payable to order; and as soon as the omission was discovered it was rectified by the proper parties. Here the alteration was plainly an after-thought: and then it brings it to the question whether it be a material alteration; of which there is no doubt, for the reasons which have been assigned

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assigned by my Lord and my brother. Then being a material alteration, and one made upon a subsequent agreement the next day, there ought to have been a new stamp.

BAYLEY J. The case of *Master* v. *Miller* decided that an alteration in a material part of a bill after it has issued makes a new stamp necessary: and this was a material alteration; for it was evidence of a fact, which if necessary to be inquired into must otherwise have been proved by different evidence.

Rule discharged.

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Friday, Jan. 27th.

DOE, on the Demise of THOMAS THORLEY, *against* THOMAS THORLEY, the Elder, and BOOTH.

One devises all his freehold estate to his wife during her natural life, "and also "*at her dis-*"*posal after-*"*wards* to "*leave* it to "whom she "pleases:" held that this only gave her a power to *leave* it *by will;* and therefore that a disposition of it by feoffment in her lifetime was void.

IN ejectment for a messuage and seven acres of land in the parish of *Dilhorn* in *Staffordshire*, the lessor of the plaintiff claimed as grandson and heir at law of *John Thorley*, who died about 21 years ago, having first made his will, dated the 18th of *November* 1786, whereby he devised to his wife *Mary Thorley* "all his personal estate, and likewise all his freehold estate, *during her natural life, and also at her disposal* AFTERWARDS *to* LEAVE *it to whomsoever she pleased;*" and made her sole executrix. The defendants claimed under a feoffment from the said *Mary Thorley*, who is since dead, made on the 28th of *May* 1787, after the death of her husband; whereby, in consideration of 20*l.*, she conveyed to her second son *Thomas Thorley*, the defendant, a house built by him upon some of the land comprehended in her husband's will, and afterwards made her will, dated the 11th of *July* 1789, in these words: "I leave to my daughter *Mary Thorley* all my freehold and personal estate, goods, and chattels, and all that I have, for her natural life; and at her death, I leave to my son *Thomas Thorley* the house and ground which I am now possessed of for the care and management of my daughter *Mary Thorley:* and in case my son *Thomas* should die before my daughter *Mary*, then his eldest son *John Thorley* to take the care and management of the same. I leave to my son *John* and to my grandson *Thomas Thorley* 1*s.* to be paid by my son *Thomas Thorley*. Likewise I desire my son *Thomas Thorley* to pay all my debts and funeral expences at my death; and I appoint *R. Willock* and *J. Dunn* my executors." *Mary Thorley* the

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mother

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mother and her daughter *Mary* are both dead. The house mentioned in the will of *Mary Thorley* was part of the premises contained in the will of her husband. And it was contended at the trial before *Lawrence* J. at *Stafford*, that the defendant was not entitled to the house conveyed by the feoffment, inasmuch as *Mary Thorley* had no power to dispose of the lands left by her husband in any way but by her *will*, and not by any instrument to operate in her lifetime: and the learned Judge was of that opinion; thinking that the word "*leave*" pointed at a testamentary disposition. And as to the other house mentioned in *Mary Thorley*'s will, it was contended that her will was not to be taken as an execution of the power, as it did not refer to the power: but the learned Judge thought otherwise; and directed the jury to find their verdict for the plaintiff as to the premises mentioned in the feoffment; giving the defendant liberty to move to enter a nonsuit if the Court should be of opinion that the feoffment was a good execution of the power; for which the defendant's counsel relied on *Tomlinson* v. *Dighton (a)*, where one devised land to his wife for her *life*, and *then* to be *at her disposal* to any of his children: and a conveyance made by the wife (and her second husband) by lease and release and fine to a trustee in fee, to the use of herself for life, remainder to her daughter in tail, remainder to her son in fee, was adjudged a good execution of the power. And on 3 *Leon.* 71. there cited; where the devise was to the wife for life, "and *after her decease* she to *give* the same to whom she would: and this power also was held to be well executed by a grant of the reversion in her lifetime.

[440] And these cases were again mentioned when the rule for entering a nonsuit was moved for in the last term.

Abbott and *Peake* now shewed cause against the rule. Assuming it to be clear by all the authorities *(b)* that the wife took only a life-estate, with a power of disposition after her death; they argued from the words of the devise that such power could only be executed by *will:* such being the natural meaning of the word *leave*, as applied to the subject-matter, especially when coupled with the express estate given to her for life, and that the property should be at her disposal *afterwards*. In *Tomlinson* v. *Dighton* the estate was placed in more general terms at the widow's *disposal;* and therefore included a disposition by deed as

(a) 1 *P. Wms.* 149. and S. C. 10 *Mod.* 31.

(b) They are collected by Mr. *Cox*, in his Notes to the Report of the case of *Tomlinson* v. *Dighton*, in 1 *P. Wms.* 149.

well

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well as by will: and the word *then* only marked the time when the disposition was to take effect; i. e. after her life estate; but not the manner in which the power was to be executed; as the word *leave* does in this case. Then if the power were meant to be executed by will, it is clear that it could not be executed by deed. By restraining his widow from disposing of the estate otherwise than by her will, the testator meant, as Lord *Eldon* observed in *Reid* v. *Shergold* (*a*), to protect her against her own act: for a will being in its nature revocable to the end of her life, she could not bind herself by any previous disposition of the estate; but must continue to the last to retain that influence over the several objects of her bounty which it was intended to give her: whereas if the power were executed by deed, it could only be revoked by reserving an express power of revocation (*b*). 2dly, Supposing the power not to be confined to a disposition by will they argued that at any rate it could not be executed by a feoffment, which by passing a fee in præsenti destroyed her own life estate to which the power was annexed; for then it was no execution of a power by a person having an estate for life to dispose of the estate after her death. In *Tomlinson* v *Dighton*, the execution of the power by lease and release, though admitted and declared to be irregular, was sustained, because it did not touch the widow's estate; the first use being to the widow herself for life. And they referred to the distinction taken by Lord *Hale* in *Edwards* v. *Slater* (*c*), between powers collateral, and such as belong to the land; and of the latter sort between powers appendant, and in gross. That considering this to be of the latter description, it was destroyed by the feoffment: and that this was confirmed by the same learned Judge in *King* v. *Melling* (*d*); where he said, fines and feoffments do ransack the whole estate, and pass or extinguish, &c. all rights conditions, *powers*, belonging to the land, as well as the land itself. And he agreed, that if the devisee to whom the power to jointure was given had only an estate for life, the recovery suffered by him would have barred it.

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Dauncey and *Puller*, contrà; reserving the consideration of the last point, if it should be necessary, which they said had come upon them by surprize; contended, as to the first, that the

(*a*) 10 *Ves. jun.* 370.

(*b*) *Hele* v. *Bond*, *Prec. in Chan.* 474. and 1 *Eq. Cas. Abr.* 342. and *Hatcher* v. *Curtis*, 2 *Freem.* 61.

(*c*) 1 *Ventr.* 228.

(*d*) 1 *Ventr.* 228.

word

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word *leave* did not necessarily restrict the execution of the power to be by will; as it might be used *in a more general sense with reference to the enjoyment of the estate after the widow's death; and there was no case which had restricted the method of executing a power by implication where it was not expressly given to be executed in a particular way. The particular mode of execution now insisted upon was as much glanced at in *Tomlinson* v. *Dighton* by the word "*then*," and in the case in 3 *Leon.* 71. by the words "*after her decease*," as here by the word "*leave*;" but yet the dispositions in both cases by irrevocable conveyances inter vivos were supported. The case in 3 *Leon.* 71. is also reported, though of an antecedent term, in 4 *Leon.* 41. and there the words creating the power were considered as referring to a disposition by *will*. In all these cases the substance of the power is the privilege of disposing of the estate after the death of the first taker; and such powers are to be construed liberally as to the mode of execution. Then the widow had the absolute disposal of her own life-estate independent of the power, and there was nothing to restrict her from disposing of it during her own life.

Lord Ellenborough C. J. This question arises on the construction of a power; and if by construing it *liberally* be meant that the Court should give to the party more latitude in the execution of the power than the person who created it intended to give, I entirely disclaim any such authority. If we can collect the meaning of the devisor, we will obsequiously give it effect; and more particularly if that which appears to us to be the true construction of the words be more for the benefit of the party for whose sake the power was created, than that which is said to be the more liberal construction. The devisor first gives to his wife

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an estate for her life, and then he says that it shall be "at her disposal afterwards to *leave* to whomsoever she pleases." In common understanding the word *leave* must be taken to apply to that sense of it in which a person making his will would naturally use it, namely, by a testamentary disposition. And this mode of disposing of the property was most for the benefit of his widow, whom he intended to benefit by confiding to her the power of disposing of his property after her death. It might have occurred to him that if he gave her a power which was to be executed by deed in her lifetime, she would thereby devest herself of all controul over the property, and be disarmed of her power to attract respect up to the moment of her death from those who expected to be objects of her bounty: whereas by confining her

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to a disposition of the property by her will, which would be ambulatory until her death, it would operate more beneficially for herself by attracting respect and protection to her to the end of her life. I am not prepared to say that this is a power so annexed to her estate that after disposing of that, she could not still have executed the power: but I found my opinion on the word *leave*, which shews that the testator meant the power to be executed by will; and differs this case from *Tomlinson* v. *Dighton*, where, after the life-estate of the widow, the property was left *at her disposal;* and the determination that such disposition might be by deed in her lifetime violated no received sense of those words. In the case in *Leonard* the power conferred on the wife was after her decease to *give* the estate to whom she would; which might import something of which the party was to devest herself presently: but the word *leave* as applied to a disposition of property emphatically means *by will.*

GROSE J. This is simply a question of intention, as to what the testator meant, after giving his widow a life estate in this property, by directing that it should be "at her disposal afterwards to *leave* it to whomsoever she pleased:" whether he meant to give her a power to pass it away by feoffment in her lifetime, or only by her will, which would retain to her the control over it to the end of her life. It might have occurred to the testator that he was giving a power over his property to be executed by one who might be under coverture again; and therefore he might well intend to direct the disposition of it by such means as would at all events secure her control over it in case she survived her second husband, and to the end of her life, and that she should not be able to debar herself of this control by any act during her life; which would be the case if this feoffment could take effect. It was meant to protect her against her own act; which could only be done by preventing her from disposing of the property during her life: and therefore the testator has said that it shall be at her disposal afterwards to *leave* it to whom she would: and we can only carry his apparent intention into effect by saying that she could only *leave* it by a *testamentary act.* If the case had rested upon the words *at her disposal*, as in *Tomlinson* v. *Dighton*, that might as well have been by common law conveyance as by will; but the word *leave* points to a testamentary disposition only; and it is clear that the testator meant her to pass the estate by her will only, which she might revoke at any time of her life afterwards. [444]

LE BLANC J. I am of the same opinion. The case is clear upon

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upon the first point, and therefore it is not necessary to give an opinion on the other; though, if it were necessary, * there is not much difficulty in it. The property is "to be *at her disposal afterwards.*" If the words had rested there, any instrument disposing of it after her death would have been within the words of the power; according to the case of *Tomlinson* v. *Dighton*, and that in *Leonard*. But the words which follow, "to *leave* it," &c. control the generality of the preceding words, and are the same as if he had said "to leave it *by her last will.*" It is argued that she might *leave* it as well by other instruments as by a will; but I do not think that the word *leave* has so extended a signification; it applies only to a disposition by will. A person may be said to *dispose* of property by deed as well as by will; but no one is ever said to *leave* property by *deed*. This mode of construing the words of the power is also much more than the other in favour of the person meant to be benefited by it: for thereby she would retain her power of disposing of it to the end of her life, and secure to herself all the time more influence and respect. The word *then* in *Tomlinson* v. *Dighton* could not be meant to apply to a disposition of the property after her death, but must refer to some instrument to be executed in her lifetime, and therefore only marked the period when the disposition was to take effect. The same may be said of the case in *Leonard*; and the word *give* there used applies as well to a gift by deed as by will.

BAYLEY J. The word *leave* as applied to the subject-matter primâ facie means a disposition by will; and if that be the ordinary sense of the word, we who are now to decide upon the meaning of the testator must say that he meant to use it in that

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sense, unless something appears to shew that he used it in a sense different from the ordinary one: but nothing of that sort does appear. And this construction is confirmed by the consideration that if the widow were confined to dispose of it by will, she would retain the power of disposition over it to the end of her life; but if she might dispose of it by deed, having once conveyed it away, she would be precluded from the exercise of any further disposing power for the remainder of her life. Then if this be a power to dispose of the property only by will, that being different from a power to dispose of it by deed, the power was ill executed, and the lessor of the plaintiff is entitled to recover.

Rule discharged.

AUBREY

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AUBREY *against* FISHER and Others.

Saturday, Jan. 28th.

IN replevin for taking so many beech poles at *Henley Hill* wood in the parish of *Hambleden* in the county of *Bucks*, the defendants avowed the taking under a warrant of distress granted by two justices of the peace for the county to the defendants as churchwardens and overseers of the poor of that parish; in which warrant it was recited that the plaintiff was an occupier of certain lands in the parish, and was duly rated for the same in 6*l.* 12*s.* 9*d.*; for non-payment of which, on demand, the distress was granted. There was a second avowry for taking the same as a distress under the stat. 43 *Eliz. c.* 2. The plaintiff pleaded several matters in bar. 1st, That he was the occupier of certain woodland in the parish, *for which he was rated in the said sum; that the wood growing upon the said woodland consisted of *beech, oak, and ash trees*; and that *according to immemorial custom in the county of* Bucks, *where the said woodland is situate, the said beech trees were and are timber:* wherefore the defendants of their own wrong took the said goods, &c. 2d, That according to immemorial custom *of the hundred of* Desborough in the county of *Bucks*, in which hundred the said woodland is situated, *the said beech trees were and are timber.* 3d, That the said beech trees were timber *according to the custom of that part of the county of* Bucks where the said woodland is situated. 4th, That the produce of the said woodland was certain wood then growing upon the same, and which wood was *not saleable underwoods.* There were other general pleas; on all which pleas issue were taken by the replication. The cause was tried before *Heath* J. by a special jury at the last assizes for the county of *Bucks*; and the learned judge afterwards, upon a motion for a new trial, made his report of the evidence, in substance as follows:

It was admitted on the part of the plaintiff that such beech trees as grew on the place in question had been usually rated; and on the part of the defendants, that by the custom of the

Where beech is admitted to be timber by the custom of the country, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at 20 years growth: and therefore upon an issue whether certain beech trees in the county of *Bucks*, (which after being felled had been distrained for payment of a poors' rate, to which it was contended that they were liable,) were or were not *timber* according to the custom of the county, the inquiry is confined to the nature of the wood and the period of its growth, whether of 20 years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained 10 feet of solid wood. And the jury having found a general verdict for the plaintiff on that issue, affirming such trees of 20 years growth and upwards, though not containing 10 feet of solid wood, to be timber by the custom, and also upon another issue negativing them to be *saleable underwood* within the stat. 43 *Eliz.* c. 2. the Court refused to grant a new trial.

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country beech trees were timber, as oak and ash trees are. (But this latter admission was now explained by the defendants' counsel in court to have been made sub modo, according to the explanation of this species of timber given by their own witnesses.) For the plaintiff it was proved by old persons used to woods and timber, that his woods at *Hambleden*, amounting to 116 acres, were stocked with oak, ash, and beech, which had been regularly cut at from 40 to 50, 60, and 70 years growth and upwards; and the woods of other persons in that part of the country, to the extent of 1300 acres, under the particular care of the witnesses examined, were under the same management. The largest trees were periodically cut, and the small ones of bad growth; but none of these latter under 60 years growth; and none of any description were ever cut so young as of 20 years growth. That beech was of very slow growth, and in 20 years would often be not larger than a hedge stake. Oak was considered to be of the quickest growth. The whole fall of trees of the plaintiff were deemed by his several witnesses to be timber, without reference to the measurement or mode of measuring. That underwood or coppice was cut very differently from woods of this description; underwoods being cut *hand smooth* or clean off from the ground, leaving standards within certain distances; whereas in these woods the largest trees were felled, leaving the smaller ones to grow up in succession; and the plaintiff's woods were never managed as underwoods. That all young trees, ash poles as well as beech poles, were called *small timber;* and both alike (but not oak) were measured by the cast till they come to 10 feet; and then by the two casts till they come to 20 feet; and then by the half foot till they come to 30 feet; and after that by the whole foot. That the mode of measuring made no difference as to the trees being reputed timber. That some beech was used for building; others for repairs of waggons, &c. That the price of the poles varied according to their length. In buying a fall of trees altogether, there was but one price; but it was higher if the trees were selected.

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On the part of the defendants, it was contended that the beech poles in question not measuring 10 feet, (which was explained to mean 10 feet solid contents of wood) though of from 40 to 60 years growth, were not *timber* by the custom of the country, and were therefore to be considered as *saleable underwoods;* and they also relied on the usage of rating such woods. And they proved by a person who had measured the plaintiff's fall of wood in question, that they were all called *beech poles*, and were from 5 to

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to 8 feet; not one of them contained 10 feet. That there was a distinction in different parishes in the admeasurement between beech *poles* and beech *timber*. It was measured by casts up to 10 feet, and beyond that by half feet and feet: 25 feet to a load of poles, 50 feet to a load of beech timber. That if it were under 10 feet, it was no timber by the custom of the country, though it were 100 years old; and it was immaterial what was the kind of tree, or its age. That beech timber was headed off at 18 inches girth from the top. All the witnesses, however, admitted that the woods in question were managed differently from underwoods, and that they did not consider them as underwoods or coppice; but they were known by the name of beech poles, and not beech timber. That the same rule obtained with regard to ash as to beech. Part of the fall in question was sold at 19*s.* a load, containing 25 feet, and was used by different manufacturers for mangles, wheels, and other purposes; a great part was said to be only fit for firewood, and was so used till within these 4 years. A timber merchant in that part of the county said he had never sold any such beech poles for any except temporary buildings; but they might be used for barn floors; and he had seen very little beech measured as timber.

The learned judge told the jury that the only question for their determination was, Whether the plaintiff's wood were *saleable underwood;* and as all the witnesses agreed that it was not [450] underwood at all, and was differently managed and clearly distinguishable from underwood, they ought to find a general verdict for the plaintiff; which they accordingly did. But as this was a new question of very considerable importance in the county, he gave leave to the defendant's counsel to move for a new trial in respect of any of the issues where the question was, whether or not it was *timber:* his own opinion being that as beech was admitted to be timber in this county by the custom as oak and ash were in the kingdom at large, the common rule of law which designates the latter to be timber at 20 years growth, without reference to its dimensions, would attach on beech trees; and the whole fall of trees in question were of that growth and upwards.

Sellon Serjt. in the last term moved accordingly for a new trial, and denied that the admission made on the part of the defendant, or the evidence given at the trial, went to establish generally that beech was timber by the custom of the county of *Bucks*, but only that it was timber when it measured 10 feet in the girth, when it was of growth and bulk sufficient for the purposes of buildings, in contradistinction to fire-wood, fence-wood, or wood for

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inferior mechanical purposes; and if the trees in question, which were of less than 10 feet measurement and unfit for building, were not timber by the custom, it followed of necessity as a consequence of law, that not being timber by common law, they must be *saleable underwood*, and therefore rateable within the statute of *Elizabeth*: and in this view the bearing of the former issues upon the last was material. A rule nisi was granted; against which

[451] *Wilson*, *Dampier*, *Hulton*, and *Peckwell*, now shewed cause. The material question was, whether the beech woods in question were *saleable underwoods*, in order to make them rateable to the relief of the poor within the stat. 43 *Eliz.* *c.* 2. *s.* 1.: and as the particular mention of *coal mines* in the same branch of the act has been held to exclude all other mines, so the mention of *saleable underwoods* only must be taken to exclude all other woods. And all the witnesses proved that these were not underwoods. This put an end to all the issues respecting saleable underwoods. Then as to the issue, whether these beech trees were timber by the custom; supposing them to be material upon this record, it was settled so long ago as Lord *Coke*'s time (*a*), who was a *Buckinghamshire* man, that beech was timber by the custom of that county, which takes its name from that species of wood; *Buck* signifying beech. And when it is once ascertained that any particular wood is timber by the custom of the county, the general rules of law respecting timber attach upon it as a consequence of law, amongst others, that the tree assumes the denomination of timber at 20 years (*b*) growth, without reference to its girth. But this is an attempt to introduce a different rule as to timber in the county of *Bucks*, either with reference to the size of the tree, or the manner of measuring it, or the uses to which it is afterwards to be applied; either of which methods would beget an issue on each particular tree, whether timber or not, and lead to uncertainty and endless litigation: and Lord *Hard-*
[452] *wicke* in *Walton* v. *Tryon* (*c*), expressly disclaimed any reference to the use of the wood by way of ascertaining whether or not it was timber; and said that in the stat. 45 *Edw.* 3. the wood is particularly mentioned, and its age and growth, but not one word is said of the use; and that the opinion of all the

(*a*) *Lapthorne*'s case, 1 *Roll. Rep.* 355. 2 *Roll. Abr.* 814. and 1 *Inst.* 53 *a.* and vide *Rex* v. *Minchinhampton Inhabitants*, 3 *Burr.* 1310.

(*b*) 2 *Inst.* 643.

(*c*) *Walton* v. *Tryon*, before Lord *Hardwicke* in 1751, 3 *Burn's Eccl. Law*, 440, 4. and 2 *Gwillim*, 827.

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Courts upon the construction of that statute had been, that where the tree is timber, *by law or custom*, of 20 years growth or upwards, it is exempt from tithe: and Lord *Coke*, in his comment on that statute, says that with respect to 20 years being the age of timber, that statute was declaratory of the common law. Oak, ash, and other general timber wood may be and often are treated as underwood, and then they are titheable and rateable as well as beech: but all the witnesses agreed that these beech woods were not treated as underwoods, but managed quite in a different way as timber. Whether any wood therefore be *saleable underwood* or not within the stat. of *Elizabeth* depends upon the management in cutting, and not upon the size or nature of the wood. Oak and ash are frequently managed as underwoods in *Kent*, and are cut for hop-poles throughout large districts. In the poor soil of this part of *Buckinghamshire* oak or ash would take 50 years to attain the growth sufficient to measure for timber in the way proposed by some of the witnesses.

The Attorney-General, Sellon Serjt., *Best* and *Frere*, contrà. The evidence was not that beech was timber by the custom of the county generally, but that it was timber when of a certain girth or dimension containing 10 feet of solid contents, which made it applicable to the purposes of building. The mode of treatment in the mean time, till it arrived at that growth, cannot make that timber which is not such by law, nor does the custom depend upon the mode of treatment. Then if the custom be so qualified that beech of a certain size only be timber within it, until it grow to that size, it must be treated as *saleable underwood*, and rateable accordingly. But the learned Judge told the jury, that as beech might be timber by the custom of the county, he would take upon himself to say, in conformity with the rule of law respecting timber trees in general, that it became timber at 20 years growth. Whereas that which stands upon custom only must be taken with all the qualifications of the custom, and general rules of law can have no application to it beyond what is evidenced by the custom in those respects. The question therefore, quo modo beech was timber by the custom, ought wholly to have been left to the jury as a matter of fact upon the evidence. But when it was admitted that beech would by the custom of the county become timber when of certain growth and dimensions, the learned Judge took on himself to decide by reference to the general rule of law respecting timber, that it would become such at 20 years growth. [Being asked by *Le Blanc* J. whether it were meant to be contended that any tree, however old, if not of certain solid contents,

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contents so as to make it timber, must necessarily be *saleable underwood:* they answered in the affirmative.] In *Chambers' Cyclopedia underwood* is described to be coppice or *any wood not accounted timber*. The general rule as to 20 years growth of certain woods constituting them timber is altogether grounded upon the stat. 45 *Ed.* 3. *c.* 3. concerning prohibitions to suits in the spiritual court for sylva cœdua, which speaks of "*great* wood of the age of 20 years," &c. sold to merchants, &c. which should not be titheable; yet that must have been understood of wood large enough to be applied to the purposes of timber; for
[454] in *Hawes* v. *Cornwal* (*a*), wood which was usually cut for fire-wood, though of 25 years growth or more, was held to be titheable: and *Twysden* J. said, that it was not the leaving it a long time that made it timber. And in the late case of *The King* v. *The Inhabitants of Mirfield (b)*, woods which were usually felled for sale at 21 years growth were still held rateable annually throughout that period as *saleable underwoods*. [*Le Blanc* J. In that case no question arose respecting the age of the woods, which were stated in fact to be *underwoods*, and were of 10 years growth.] A custom making the question of timber or no timber depend upon the dimensions of the tree, is in its nature more certain than a rule which has a reference only to its age.].

Lord ELLENBOROUGH C. J. The question is, whether certain woods were liable to be rated to the relief of the poor under the statute 43 *Elizabeth?* And that depends upon whether they ranged themselves under the description of *saleable underwoods* in the statute; for under that character or denomination only were they liable to be rated. And here a verdict has been found by the jury, under the direction of the learned Judge who tried the cause, upon the evidence of witnesses on both sides concurring uniformly to the same conclusion, that they were not *saleable underwoods*. That finding then, without adverting to any other issues on the record, decided the action, as to the rateability of the woods and the right of taking the distress; for if they were not *saleable underwoods*, whatever else they might be, appears in my present judgment of the case to be immaterial.
[455] There are however other issues, as to whether the particular trees in question were timber trees; which might be considered as material issues on the part of the plaintiff; for if they were of that description of trees which by the custom might become timber, it would be open to him to shew that they were of that

(*a*) 1 *Lev.* 189. and 2. *Keb.* 90. (*b*) *Ante*, 219.

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age which privileged them as timber trees from being liable to be tythed or rated to the poor. And that might be considered as a medium of proof that, being *timber*, they were not *saleable underwoods*. Now the issues, whether timber or not, did not properly embrace any such questions as have been argued, whether there be any qualifications by the custom of the county of *Bucks* respecting the size or application of the trees to make them timber; but the questions properly were, whether the trees were of that quality and age as entitled them to be considered under the denomination of *timber*, and therefore entitled to the protection belonging to timber by law, namely, whether beech were by the custom of the county a timber tree, and whether these beech trees were of the growth of 20 years. But I am at a loss to find a scintilla of authority in any law book to warrant me in saying, that though oak and ash, which are timber trees every where by the general rule of the realm, become timber at 20 years growth, without any other qualification, and beech is recognized in our law books as a timber tree by the custom of the county of *Bucks;* yet that there may be a certain other qualification, depending on the quantity of its solid contents, attached to beech, which does not belong to oak or ash. If the qualification of having 10 feet of solid contents may be attached upon beech to make it timber in the county of *Bucks*, I see no reason why it may not as well be attached there upon oak and ash, which are timber by the general law of the realm. But our law books are quite silent [456] upon the subject of any such qualification: nor is there any thing in the wording of these issues to raise the question. And if such a distinction were admitted, it would lead to great uncertainty and inconvenience. It might be different in different districts of the county of *Bucks*. In one the solid contents required to make the tree timber might be 10 feet; in another 9; in another 8. In other counties where other trees are timber by custom, we should have the same or other distinctions starting up; not a word of which is to be found in any law book. It is laid down generally by Lord *Coke*, and supported by adjudged cases, that beech is timber by the custom of the county of *Bucks*. Then why should we not be bound to take notice of that custom so declared and established, as we take notice of the custom of gavelkind in *Kent?* And when beech is declared to be timber by the custom, it must be taken to be timber according to the rules of the common law respecting timber. Still however the material question is, whether these were saleable underwoods? In some counties, particularly in *Kent*, they are much in the habit

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habit of cutting down wood as underwood which would be most valuable timber if it were suffered to grow to the statuteable age, if I may so call it, of 20 years: but it is treated as underwood: but all the witnesses agreed that this was treated not at all like underwood. It is stated that where the woods are managed as underwoods, all the small wood is cut down at stated periods, leaving standard trees at certain distances: whereas here they cut down the larger and leave the smaller wood: it was not therefore treated in any respect like underwood. Then as to the evidence of the qualification of the custom contended for, what does it

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amount to? One witness only says, that if the tree does not contain 10 feet of solid contents it is not timber but *underwood:* but his evidence cannot be put against the other testimony, and against the silence of the law, which is eloquence on a subject of this sort that has been so much discussed in the books.

GROSE J. The only question is, whether this be *saleable underwood* in contradistinction to *timber;* and when we consider the evidence, and attend to what has been said upon this subject, it is impossible to doubt for a moment what it was. The trees which were felled were beech trees of more than 20 years growth; beech is timber by the custom of the county of *Bucks;* and the law books recognize it as timber there by that custom: and the evidence proves that these woods were not managed or cut as saleable underwoods, nor bought or sold as such, but as timber. Then beech being timber by the custom of the county, and these beech woods being of more than 20 years growth, and not being managed or cut as underwoods, what doubt can there be but that in this case, as well as in the case of other general timber trees, they must be considered as timber, and not as saleable underwoods. Then if this be the clear sense and law upon the subject, as it seems to be, it would be to no purpose to send this cause again to trial, since there must be the same verdict again upon the same evidence. I have no doubt that by the custom it is timber; and being timber, it cannot be saleable underwood, which is the material question upon these issues.

LE BLANC J. The question, with reference to the statute of

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Elizabeth, is, whether the wood felled, and on which a distress has been levied in respect of a poor's rate thereon, be *saleable underwood?* This is a question of fact; and considering it as such, there can be no doubt; because all the witnesses agreed that this had none of the qualities of underwood; that it was never managed or treated as such; and some of them said they would not on any account call it so: considering it therefore as an

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issue of fact, there can be no doubt that the determination of the jury was warranted by the evidence. But it is now said that that issue was in truth a conclusion of law resulting from the inquiry whether or not the trees in question were *timber* by the custom; that if they were not timber, they must necessarily be saleable underwood. And to be sure the case as it was stated to the learned Judge was considerably perplexed, or rather it was presented to his mind in a very different view from that in which it is now attempted to be placed, when at the outset of the cause it was admitted that by the custom of the county beech is timber, and this without any modification. And though if that were incautiously admitted, without the qualification meant to be insisted on, it should not prejudice the defendant; still it led to the course which the cause took at the trial. For when it is understood and agreed on both sides that by the custom of the particular county, where there is a scarcity of the common species of timber wood, and where the soil favours the growth of another species of wood, that other species shall be considered as timber; the only question according to the usual course observed in such cases has been upon the nature of the wood in dispute, whether of that species, and not upon the size of it; and when once that species has been considered as timber, the question is whether it shall not carry with it all the properties and consequences of [459] timber by the general law, and not be liable to be qualified by the particular opinions of individuals in different parts of the county, as to whether it were of a size sufficient to be useful or not useful as timber. It seems therefore that the last issue was properly an issue of fact, and properly determined; and that even if it had gone to the jury upon the ground now contended for, whether the beech trees in question were timber or not according to the custom, the verdict must upon the weight of evidence on that head have been the same way in which the jury have found upon the issue whether it were saleable underwood or not. For I agree with the learned Judge, that when once a particular wood has been determined to be timber by the custom of a county, it is to be taken to be so according to the rules of the common law in respect to timber in general; and therefore the issue whether timber or not by the custom of the county will only let in the inquiry as to the particular species of wood, and will not let in those qualifications which were attempted to be introduced in this case.

Rule discharged.

BAYLEY J. was trying causes at *Guildhall*.

JOHN

Tuesday, July 31st,

JOHN TOOVEY and KEMPSTER HUGHES KNIGHT, an Infant, by KEMPSTER KNIGHT, his Father and next Friend, *against* JOHN BASSETT, and GEORGE BASSETT, JOHN CHARLES LOWTH, and ANN his Wife, ROBERT HUNTSMAN and JERONOMY his Wife, AUBREY BOWLES HUGHES, JANE TOOVEY, CATHERINE BASSETT, and JAMES ROE and HARRIETT his Wife.

Under a devise to the testatrix's daughter *E.* for life, remainder to her children and their heirs for ever; but in case *E.* die without leaving any issue of her body, then to certain other grandchildren by other daughters equally to be divided between them share and share alike as tenants in common; but in case of the death of either of her grandchildren, *under age and without leaving any issue,* the share of him or her so dying should be for the benefit of the survivors of the respective family, &c. Held that the grandchildren took a fee in their respective shares, by reason of the devise over on their dying *under age,* with an executory devise over if any of them died under 21 and without leaving issue *at the time of their respective deaths;* and therefore the limitation over was not too remote.

THE Master of the Rolls sent the following case for the opinion of this Court.

Ann Michael, widow, being seized in fee of a freehold estate called *Perry Lands,* at *Shipley* and *West Grinstead,* in *Sussex,* and being possessed of a leasehold estate at *Midhurst* in the same county for the remainder of a term of years unexpired, by her will dated the 13th of *December* 1786, and duly executed and attested, after stating "that she thereby disposes of her worldly "estate wherewith God had been pleased to bless her as follows," devised thus: "First, I give and devise all that my messuage, "lands, &c. called *Perry Lands,* in the parishes of *Shipley,* "and *West Grinstead,* and also all that messuage and garden in "*Midhurst,* &c. unto my daughter *Elizabeth Michael,* to hold "all the said several premises unto her for and during the term "of her natural life; and, in case of her marriage, for and "during the term of the natural life of her husband; and from "and after the decease of the survivor of them, my said daughter * *Elizabeth* and her husband, (in case she marries) I give "and devise the same premises unto all and every the children "on the body of my said daughter *Elizabeth* by her said husband "to be begotten, and unto their heirs; and if but one child, then "unto such only child and to his or her heirs for ever. But in "case my said daughter and her husband die without leaving "any issue of her body, then I do hereby give and devise all "the said several premises unto my grand-children *John Toovey,* (son of my daughter *Jane Toovey,*) *John, George,* and *Ann* "*Bassett,* (children of my daughter *Catherine,* wife of the Rev.

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"*John Basset*) and the child or children with which she my "said daughter *Catherine* is now pregnant, and unto *Elizabeth* "*Mary, Henrietta, Harriett,* and *Aubrey Bowles,* (daughters and "son of my daughter *Mary Hughes*) equally to be divided be- "tween them all, share and share alike, as tenants in common. "But in case of the death of either of my said grand-children "*under age,* and *without leaving any lawful issue,* then it is my "will that the share or part of him, her, or them, so dying, "shall be for the benefit of the survivors of the respective family "to which he, she, or they belong. And in case of the death of "my grandson *John Toovey, under age,* and *without leaving any* "*lawful issue,* then it is my will that his share or part of the "said several premises shall go and be divided amongst all and "every of my surviving grand-children." There was no residuary devise of real estate; but the testatrix devised all her goods, chattels, and personal estate to her daughter *Elizabeth.* The testatrix died soon after making her will; leaving her daughter *Elizabeth* then the wife of *Richard Burley,* her daughter the defendant *Jane Toovey* widow, her daughter the defendant *Catherine Bassett,* her daughter *Mary Hughes,* and another [462] daughter *Jeronomy Newman,* formerly *Jeronomy Michael* spinster, (the two last of whom are since dead,) her co-heiresses at law; and also leaving the plaintiff *John Toovey,* the defendants *John Bassett, George Basset, Ann* the wife of *John Charles Lowth, Elizabeth Mary,* (since deceased) the wife of *Kempster Knight, Henrietta Hughes,* (since deceased) *Harriett* the wife of *James Roe,* and *Aubrey Bowles Hughes,* her eight grandchildren: and soon after the testatrix's death, her daughter *Catherine Bassett,* (who at the time of the will made was pregnant) was delivered of a daughter named *Jeronomy,* who is now the wife of the defendant *Robert Huntsman. Elizabeth Mary Knight,* one of the testatrix's grand-children, died some time ago, intestate as to her real estate, leaving the plaintiff *Kempster Hughes Knight,* an infant, her eldest son and heir at law. Soon after the death of the testatrix, *Richard Burley* and *Elizabeth* his wife entered into possession of the devised estates, and continued in possession till their respective deaths; and they died without leaving issue. *Henrietta Hughes* is lately dead, having first attained her age of 21 years, and having by her will devised her share of the devised estates to the defendant *Harriett Roe.* The question for the opinion of the Court was, what estate or interests the plaintiff *John Toovey,* and the defendants *John Bassett, George Bassett, Ann* the wife of *John Charles Lowth, Elizabeth*

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Elizabeth Mary, deceased, the late wife of *Kempster Knight*, *Henrietta Hughes*, deceased, *Harriet* the wife of *James Roe*, *Jeronomy*, the wife of *Robert Huntsman*, and *Aubrey Bowles Hughes* the nine grand-children of the testatrix *Ann Michael*, took under her said will in the freehold and leasehold premises?

[463] *Gaselee* for five of the grand-children, (the plaintiffs *John Toovey*, and the defendants *John* and *George Bassett*, *Ann Lowth*, and *Jeronomy Huntsman*,) contended that they took, as tenants in common, a fee in the freehold, and the absolute interest in the leasehold. The introductory words shew that the testatrix did not mean to die intestate as to any part of her estate; and there is no residuary clause. It is now unnecessary to consider what estate the children of her daughter *Elizabeth* would have taken, if there had been any; (either an estate tail, or an executory devise with a remainder over;) that estate being disposed of in the event. The next limitation is to the several grand-children by name "equally to be divided between them all, share and share alike, as tenants in common." So far that would only have given them estates for lives: but the clause which follows, directing that "in case of the death of either of my said grand-children *under age*, and *without issue*," his or her share shall be for the benefit of the survivor of that branch of the family, &c. carries the fee: because if only a life estate had been intended to be given to each, it was immaterial whether the devisee attained the age of 21 or not: and giving the share of each over in this manner, only in the event of the party dying under 21, shews that the testatrix intended each grandchild to take a fee if he or she attained 21. If the share of each had only been given over upon the devisee's dying *without issue*, it might have been contended that he would only take an estate tail: though were the devise over was to the heir at law, in *Robinson* v. *Grey* (*a*), that was held to give a fee to the antecedent takers. But even in this view the leasehold would pass absolutely. To

[464] shew that a devise over, upon the first devisee's dying *under* 21, would give a fee to such first devisee attaining that age, he referred to *Frogmorton* v. *Holyday* (*b*), and *Doe* v. *Cundall* (*c*): and distinguished these from *Doe d. Kandler* v. *Smith* (*d*), where an estate tail only was adjudged to the first taker, because such an estate was expressly devised to her in the first instance, and

(*a*) 9 *East*, 1.
(*b*) 3 *Burr.* 1618.
(*c*) 9 *East*, 400.
(*d*) 7 *Term Rep.* 531.

that

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that construction best effectuated the general intent of the testator. And there too the only question made was, whether the first taker had an estate for life only or in tail, and not whether she took in tail or in fee? But here the estate is given in the first instance to the granchildren generally, and therefore there is no express declaration of the testatrix's intention to the contrary, to obstrnct the legal effect of the subsequent words.

Reader argued to the same effect for *K. H. Knight*, a son of one of the grand-daughters.

Nolan argued to the same effect for *Harriett Roe*, another of the grand-daughters: and added, that if they were considered to take only estates for lives, the words, in case of the death of either, "*without leaving any lawful issue*," must be rejected altogether; and unless they take a fee, the words, in case of the death of either "*under age*," will be nugatory.

Holroyd, contrà, for the two defendants *Jane Toovey* and *Cath. Basset*, co-heiresses of the testatrix, contended that the grandchildren took only estates for lives, or at most estates tail in their original shares, and that the devise over to the survivors was too remote, as being after an indefinite failure of issue. First, [465] they took only life estates, because an heir can only be disinherited by express words or necessary implication; and there are no such words; and no such implication can arise from the devise over; for all the cases where a devise over after a dying within age has been held to carry a fee to the first taker attaining 21, are founded upon the dictum of the reporter at the end of the case of *Purefoy* v. *Rogers* (*a*). But there the devise over was to the heir at law of the devisor, and the reasoning on which it is founded only applies to such a devise over. And in *Fowler* v. *Blackwell* (*b*), where the devise over was to an elder son, if the younger should die before 21, it was held not to pass a fee to the first taker. [Lord *Ellenborough* C. J. The devise over was not to the heir at law either in *Frogmorton* v. *Holyday* (*c*), or in *Doe* v. *Cundall* (*d*).] Admitted; but those cases may be distinguished from the present; for in the first, unless a fee had been given to the first taker, the testatrix would not have disposed of all her worldly estates as she professed to do. Whereas here a fee is expressly given to the children of *Elizabeth*, before the devise in question; and it is only in a particular event that the estate is given over. Here, therefore, the introductory words

(*a*) 2 *Saund.* 388. *a.*
(*b*) *Com. Rep.* 353.
(*c*) 3 *Burr.* 1618.
(*d*) 9 *East*, 400.

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are satisfied without giving a fee by implication, which they were not in the other case. There too the limitation over was only upon a dying *under* 21, and not also upon a dying *without issue*. There was also a charge there upon the estate; which was observed upon by the Court. [Lord *Ellenborough*. The charge was no burthen upon the devisee, but was to be paid out of the
[466] rents and profits.] The testatrix also had given a fee to one of her sons in another estate; and it did not appear to the Court that any distinction was intended by her as to the nature of the estate devised to the other son. And in *Doe* v. *Cundall* the limitation was that if the party should die before 21, the survivor should be *heir* to the property: which shewed that the first was to take an estate of inheritance; because in the particular event of his dying under 21 the testator substituted an heir in the place of the heir who would otherwise have taken. If however it is to be implied from the devise over that the grandchildren were to take an estate of inheritance, they will only take an estate tail and not a fee: for this is a devise over not only upon a dying before 21, but also *without issue;* which shews that the testatrix did not intend that the estate should go over on a dying before 21 alone, but on a dying "under 21 *and* without issue:" but if the grandchildren attained 21, she meant at all events that their issue was to take; which will only give them estates tail. But if the grandchildren took a fee, the limitation over to the survivors of the shares of those who died under 21 and without leaving issue will be too remote; being an executory devise, and not a contingent remainder; and being after an indefinite failure of issue. This differs it from the devise over in *Doe* d. *Candler* v. *Smith (a)*, which was after a devise to one and the *heirs of her body for ever* as tenants in common. There, though the issue could not take as tenants in common if the ancestor took as tenant in tail; yet as the general intent could not otherwise be effectuated, the Court held that the ancestor took an
[467] estate tail. The general rule of construction on the words, dying without issue, has been, with respect to leasehold, to restrain them to a dying without issue at the time of the death of the preceding taker; but in the case of freehold they have been taken to mean an indefinite failure of issue, unless there have been other words to shew an intent to confine the meaning of them (*b*).

(*a*) 7 *Term Rep.* 531.

(*b*) See the cases on this subject collected in a note of Mr. Serjt. *Williams* to *Purefoy* v. *Rogers*, 2 *Saund*, 388. *c*.

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Lord ELLENBOROUGH C. J. The testatrix could not have contemplated an indefinite failure of issue at any remote period, because she only looked to a period while her grandchildren were under age. The context therefore shews that the devise over, upon a dying without leaving issue, must be confined to the time of the death of the preceding taker. Then with respect to the other question, it is enough to say that there is no sufficient distinction between this case and those of *Frogmorton* v. *Holyday*, and *Doe* v. *Cundall*, to lead us to a different conclusion; but we are bound by these authorities to say that the grandchildren took a fee. If those cases had been cited before the Master of the Rolls, he probably would not have sent this case for our opinion.

Afterwards the following certificate was sent to his Honor:

This case has been argued before us by counsel: we have considered it, and are of opinion that the said plaintiff *John Toovey*, and the defendants *John Bassett*, *George Bassett*, *Ann* the wife of *John Charles Lowth*, *Elizabeth Mary*, deceased, the late wife of *Kempster Knight*, *Henrietta Hughes*, deceased, *Harriett*, the wife of *James Roe*, *Jeronomy*, the wife of *Robert Huntsman*, and *Aubery Bowles Hughes*, the nine grandchildren of the testatrix, [468] *Ann Michael*, took under her said will estates in fee, as tenants in common in the said freehold premises, and an absolute interest as tenants in common in the said leasehold premises, with executory devises over, if any of them died under 21, and without leaving lawful issue at the time of their respective deaths.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Tuesday, Jan. 31*st.*

MOFFAT and Another *against* The EAST INDIA Company.

The clauses in the *East India* Company's charter-parties, whereby the Company agree to allow 200*l.* per month for provisions while the ship remains in *India* or *China*, to be computed from her delivery of the Company's dispatches (if any) at the ship's "*first consigned port*, until she should be dispatched from her *last port* in *India* or *China* to return to *Europe*," is to be understood of her *last consigned port*; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions,) on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again despatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again despatched her for *Europe*, they paid the 200*l.* a month for that period.

The 14*l.* covenanted to be paid by the Company to the ship-owner in *England* for each passenger ordered on board the ship in *India* by the Company's agents, is payable notwithstanding the loss of the ship before her arrival in the *Thames*.

IN covenant, the declaration set out a charter-party entered into by the Company with the plaintiffs, as owners of the ship *Ganges*, in the common form, dated *London*, 3d *October* 1804, whereby the plaintiffs let to freight *all* the said ship to the Company for a certain voyage in trade, and also in warfare, and on any other service whatsoever as the Company or any of their authorized agents, &c. should direct in writing. And it was agreed that the ship should proceed from the *Downs* to such ports and places in the *East Indies*, &c. or elsewhere as the Company should direct. That the master should carry out the value of 500*l.* in foreign coins, &c. for the *supply of the ship's extraordinary occasions in *India*, and in her outward voyage; and if she should arrive at her first *consigned port* in the *East Indies* or *China*, then the Company's agents should supply to the master by way of impress for buying necessary provisions for the ship 200*l.* for every calendar month, and so in proportion for a less time, so long as she should remain in *India* or *China*, to be computed from the time of the delivery of the Company's dispatches at the ship's first *consigned port* in *India* or *China*, and to continue *until the said ship should be despatched from her* LAST PORT in *India* or *China to return to* Europe. And it was also agreed that the Company or their agents should pay to the plaintiffs *in England* 14*l.* *for each passenger* ordered on board the said ship by any of the Company's agents from any of their settlements, &c. in the *East Indies*. The plaintiffs then averred, that after the making the said charter-party, viz. on 24th of *April* 1805, the Company directed in writing that the ship should proceed from the *Downs* to *Madras*, *Prince of Wales's Island*, and *China*, but did not put on board any dispatches to their president, &c. at *Madras*, and thereby discharged the master from delivering such dispatches. That the ship accordingly sailed on her

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said voyage, and on 25th *August* 1805 arrived at *Madras*, being her first *consigned port* in the *East Indies*, &c. And then the plaintiffs assigned as breaches, 1st, that though the ship remained in *India* or *China* for 20 calendar months computed from the time when the master would have delivered the Company's dispatches, if any, at *Madras*, until the ship was afterwards on the 25th of *April* 1807 dispatched from her last port in *India* or *China*, according to the true intent and meaning of the charter-party, of which the Company had notice; yet the Company or their agents, &c. did not supply the master with the said 200*l.* [470] for every calendar month, &c. while the ship remained in *India* or *China*, but made default therein, &c. 2dly, That after making the charter-party, viz. on the 25th of *February* 1807, divers passengers were ordered on board the said ship by the Company's agents from *Bombay*, one of their settlements in the *East Indies* and were received and maintained on board: but neither the Company nor their agents paid to the plaintiffs the said 14*l.* for either of the said passengers, but refused so to do, &c. to the plaintiffs' damage of 500*l.*

To this the defendants pleaded several pleas in bar; amongst others, 3dly, that it was further covenanted by the charter-party that the ship, having received in her lading, and the master his dispatches, should depart from her *last lading port*, and (dangers of the seas excepted) should sail directly and return without any deviation, other than should be ordered by the Company, or their agents abroad, to *London*, and make a due discharge into the Company's warehouses of her cargo. And that if the ship should by written orders from the Company be detained at *St. Helena* or any other port to stay for convoy, they should allow demurrage of 27*l.* 1*s.* 8*d.* a day; but that they should not pay demurrage for the time the ship should take in amending any defects, except for damage received in offensive service against the enemy, &c. But if she were detained in the Company's service beyond the 11th of *February* 1807, and by reason thereof should need repair, then the Company should pay demurrage at the rate aforesaid for every day she should be under repair not exceeding 30 days, &c. And it was further covenanted that *if the ship should not arrive in safety in the* Thames, *and there make a right delivery of her whole cargo*, the Company should not be liable to pay *any of* [471] *the sums* before agreed for freight and demurrage, except as therein before mentioned; nor subject to any demands of the owners or master on account of the said ship's earnings in freight voyages for the Company, or on account of *any other employment:*

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ment: but if she arrived safely and made such delivery, then all the freight and demurrage should be paid in the manner and at the times therein set forth. And then the plea stated that the ship remained in *India* and *China* for 7 months, computed from the time when the master would have delivered the Company's dispatches at *Madras*, until she was afterwards dispatched to return to Europe, to wit, at *Canton*, the same being *the last lading port* of the ship according to the true intent and meaning of the charter-party. That the ship afterwards sailed to return to *Europe* pursuant to the covenants in the charter-party, and while on such voyage, without the orders of the Company or their agents, &c. returned to *Bombay*, a port in *India*, and without any such orders continued there for 5 months. And that afterwards on the 25th of *November* 1806, the governor and council of *Bombay* detained the ship there for 2 months till convoy for *Europe* was ready to sail, and then dispatched her to return to *Europe*. And then the Company averred, that all the time in this plea mentioned, *except from the time of the ship's being first dispatched to return to* Europe *until she was detained at* Bombay, they monthly supplied the master of the ship at the rate of 200*l*. for every calendar month, &c. by way of impress for buying provisions for the ship, according to their covenant, &c.

To this plea the plaintiff replied, that after the arrival of the ship in the *East Indies*, and after she was laden by the Company,

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she was dispatched to return to *Europe*, and that afterwards while she was sailing on her voyage in that plea mentioned and before the completion thereof, she was greatly damaged by the perils of the sea, and for the necessary preservation of the ship and cargo the master was obliged to put into *Bombay*, and to remain there for the repair of the ship for ten months then next ensuing, and until the ship was detained by the governor and council of *Bombay*, as in the plea mentioned, and then was by them dispatched to return to *Europe* from *Bombay*, being *the last port* in *India* or *China* from whence the ship was dispatched; which is the same time between the said ship's being first dispatched for *Europe* until she was detained at *Bombay* aforesaid in that plea mentioned, &c. To this there was a general demurrer.

The defendants further pleaded, 5thly, that it was also covenanted by the charter party as in the 3d plea mentioned; and that the ship, after being dispatched from her *last port* in *India* or *China*, as in the declaration mentioned, to wit, from *Bombay*, and before her arrival in the *Thames*, to wit, on the 1st of *March* 1807

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1807, was lost by the perils of the sea; and that though divers goods of great value were laden on board the ship at *Canton* in *China*, yet she has not made a right delivery thereof according to the charter-party, &c. There were several other pleas similar in substance; to all of which the plaintiffs demurred generally.

W. Adam, for the plaintiffs, stated the first question on the demurrer to the replication to the 3d plea, to be, whether the Company were bound to advance the 200*l.* per month to the master of the ship in *India* for the time which elapsed from the ship's being dispatched from *Canton* to her detention by the governor and council of *Bombay:* in other words, whether the [473] computation of the time for which the 200*l.* per month is to be paid which is expressed to be from the ship's "first *consigned* port in *India* or *China*, until she should be dispatched from her *last* port in *India* or *China* to return to *Europe*," must be understood of her "*last consigned* port from which she is dispatched to return to *Europe*; or simply, of her "*last* port" at which she shall have lawfully touched in *India* or *China* before her actual return to *Europe*. He contended for the latter as being the plain meaning of the words used, to which the Court were bound to give effect, unless it manifestly appeared to be the intent of the contracting parties to use those general words in a more limited sense; the contrary of which, he argued, was to be collected from the change of expression in the same sentence; and also from the reason of the reservation, which applied as well to a detention for necessary repairs in any of the Company's ports in *India*, into which the ship was driven by stress of weather, as in a consigned port. 2dly, Upon the demurrer to the 5th plea, he argued that the plaintiffs were at all events entitled to recover for the 14*l.* a head for the passengers ordered on board in *India*, although the ship was lost before her arrival in the *Thames*. This allowance was not to be paid in the nature of freight; for the Company had before hired the whole ship to freight; but for the extra expence incurred by the captain in laying in provisions and other necessaries for the use of the passengers; which expence was incurred in the first instance, and did not depend upon the subsequent safe arrival or loss of the vessel in the course of the voyage. It would be the same thing though the passengers had died in the course of the voyage.

Bosanquet, contrà, observed on the last point; (the Court having intimated that they had no doubt on the first; that the 14*l.* [474] for each passenger was covenanted to be paid by the Company *in England*; by which it seemed that the arrival of the ship with

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her passengers in *England* was a condition precedent to the payment of the money; following the general nature of freight, to which such a covenant appertained. And it is expressly stipulated that if the ship should not arrive in safety in the *Thames*, &c. the Company shall not be liable to pay any of the sums specified for freight and demurrage, nor be subject to any demands of the owners or master on account of *any other employment*. Now this was an *employment* of the ship; and it cannot make any difference whether the ship be employed in the Company's service in carrying passengers or goods: if there be more passengers there must be fewer goods: and this is only an extra allowance of freight, which must be governed by the general rule respecting freight. It is not said that the 14*l*. is to be paid for providing maintenance for the passengers. [*Le Blanc* J. asked if the owners did not victual the ship: which was answered in the affirmative.]

Lord ELLENBOROUGH C. J. As to the first point; the payment of the 200*l*. per month is limited to cease at the time when the ship shall be *dispatched* from her *last port to return to Europe;* and *Canton*, which was her *last consigned* port, was properly her *last port* for the purpose of being *dispatched to return to Europe*, within the meaning of the contract. But as to the demand for the 14*l*. for each passenger ordered on board, the plaintiffs are entitled to recover. An extra expence is incurred by the owners in laying in a stock for the necessary subsistence of
[475] the persons ordered on board by the Company's agents: and to reimburse this charge the payment is to be made at home. And I do not think that this demand is repelled by the stipulation referred to in the charter-party, that if the ship shall not arrive in safety in the *Thames*, &c. the Company shall not be liable for the freight and demurrage agreed on, or for any demands on account of the ships earnings in freight voyages for the Company; or on account of *any other employment:* for construing the latter words according to the context, it means the *employment* of the ship in any other voyage or adventure; and we know that the Company reserve to themselves the power of employing their chartered ships on other accounts than trading voyages, as in warfare. The putting these passengers on board does not alter the employment of the ship as to her destination; they must go wherever the ship would otherwise be ordered to proceed, if they were not on board. This claim therefore is not repelled by the loss of the ship before her arrival.

GROSE J. declared himself of the same opinion.

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LE BLANC J. As to the first point; the "*last port*" of the ship must be understood to refer to her last port in the course of the voyage directed under the charter-party; which was to *Madrass, Prince of Wales's Island,* and *China;* and *Canton* was her last port in *China,* from whence she was dispatched on her return to *Europe.* As to the second point; the 14*l.* is to be paid in *England* for each passenger *ordered on board* the ship; not for each passenger who should be *brought to* England: and it was meant to be a compensation for providing diet and accommodation for the passengers, which expence would at all events be incurred whether the ship arrived or were lost.

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BAYLEY J. The quantity of provisions must be provided in the first instance in proportion to the number of passengers put on board by the orders of the Company's agents. The owners therefore ought not in justice to sustain the loss.

Judgment for the Plaintiffs on the demurrers to the 5th and subsequent like pleas; and for the Defendants on the rest.

HILL *against* SMITH.

Tuesday Jan. 31*st.*

TRESPASS for taking wheat and other grain of the plaintiff at *Droitwich* in the county of *Worcester,* and converting the same to the defendant's use. To which the defendant, in addition to the general issue, pleaded several special justifications. 1. As to taking 30 pints of wheat, part, &c.; that the city of *Worcester* is an ancient borough or city, and the citizens or burgesses have immemorially been a body corporate by different names till the charter of the 19 *Jac.* 1. incorporating them by the name of the mayor, aldermen, and citizens of *Worcester;* and that the said citizens or burgesses, from time immemorial until that charter, and the mayor, aldermen, and citizens since, have had and

Where the corporation of *Worcester* had for above 40 years received toll upon corn sold in their market by sample, and afterwards brought within the city to be delivered to the buyer; and for about 60 years back as far as living memory went, when corn pitched in the market place on one market day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer; though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market in the manner now practised between 40 and 50 years ago.

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held and *been used and accustomed, and of right ought, to have and hold a market in the said borough or city, in a certain place there, now called the Corn-market, on every *Saturday*, (except when *Christmas-day* happens on a *Saturday*,) for the buying and
[*477] selling of wheat and other grain there; and during all the time aforesaid have, at their own costs and charges, *repaired the highways and pavements of the said corn-market, and other highways and streets* in the said borough or city, for *the more convenient bringing of grain into the* said *borough or city to be sold there;* and *by reason of the premises* have immemorially taken, &c. for their own use a certain reasonable toll, viz. one pint of wheat, corn measure, for every 3 bushels of wheat, reckoning the same according to the quantity sold and delivered as such in the said city or borough, sold in the said market *by sample*, and afterwards brought into the said borough or city to be delivered to the buyer, to be paid by the seller of such wheat, except where the seller of such wheat has been a freeman of the said city or borough, and except of any person otherwise exempt by law from the payment of the said toll, and except wheat that had before paid toll in any market or fair in the said borough or city: and in case of non-payment of such toll after reasonable request, &c. the corporation have immemorially taken a reasonable distress for the same, &c. The plea then averred that the plaintiff on a certain market day sold to one *T. Hull* 31 bags as for 3 bushels of wheat in each bag, by sample, to be delivered in the said city, which said wheat, of which the said 30 pints were parcel, &c. was afterwards brought to be delivered to *T. Hull* in the said corn-market in the said city, &c. (negativing its coming within any of the exemptions.) That the defendant, as servant of the
[478] corporation, requested the plaintiff, then and there having the possession of the said wheat, to pay toll for the same, being in the said market place, and within the said city; and on his refusal, took the said 30 pints, &c. for and in the name of a distress for the said toll. The 2d special plea introduced another exemption from the payment of the toll, viz. where the wheat was drawn into the city in the cart or carriage of any freemen, &c.; and stated that on payment of such toll on request, the corporation had immemorially taken the same out of the wheat so sold by sample in the said market, and afterwards brought to be delivered to the buyer in the said borough or city, and to detain the same for the said toll. The 3d special plea stated that the city of *Worcester* was immemorially lying within and parcel of the manor of *Worcester*, of which manor the corporation, &c. have been

immemorially seised, and in respect of such manor have immemorially taken and received the toll *for and in consideration of the liberty of coming*, going and passing with corn and grain into the said borough or city, so being parcel of the said manor; and in case of non-payment have immemorially taken a reasonable distress, &c. The 4th plea stated that the corporation have immemorially *repaired the horse and carriage road* in a certain street in the said city of *Worcester, called the corn-market, amongst others*; and by reason of the premises have immemorially taken and received the said reasonable toll, viz. one pint for every 3 bushels of corn or grain by any person brought into the said borough or city over and along the said horse and carriage road, in the said street called the corn-market, to be delivered to any buyer thereof; except as before, &c.; with the same power of distress and detention in case of non-payment; and then averred that the plaintiff had brought into the said city 93 bushels of [479] wheat over and along the said horse and carriage road to be delivered in the said city, &c. Wherefore, &c. The replication to the first special plea traversed the liability of the corporation to repair the highways and pavements of the corn-market and other highways and streets in the borough or city, as stated in that plea, and that by reason thereof they have been entitled to take the toll therein claimed; and the like traverse was taken on the 2d plea in respect of the claim of toll there stated. The replication to the 3d plea traversed the right of toll therein claimed in respect of the seisin of the manor of *W.* in consideration of the liberty of going with corn into the said borough or city, as claimed in that plea. And the replication to the 4th plea traversed the liability of the corporation to repair the horse and carriage road in the street called the corn-market, among others, and their right in respect thereof to the toll claimed. On all these traverses issues were taken.

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At the trial of the cause before *Le Blanc* J. at *Worcester*, it appeared that the corporation had immemorially repaired the pavements of the corn-market and some of the streets in the city, but not all of them: and no question was made but that they were immemorially entitled to and had always received the toll claimed in respect to all corn brought in bulk into the corn-market and sold there. And they had also received toll of all corn sold in the market by sample, and afterwards brought into the city to be delivered since the practice of selling by sample had prevailed. And the only question was, whether they had a prescriptive claim to the toll for corn sold by sample in the market,

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ket, and afterwards delivered within the city; in which manner the corn, for the toll of which the distress* in question had been taken, had been sold and delivered; the sample having been exhibited in the market by the plaintiff, the seller, in a small bag at the time of the sale, before any part of the commodity in bulk had been brought into the city, but which was afterwards delivered in the market-place within the city. Of the precise time when this mode of selling by sample *in small bags* originated no certain evidence was given, but probably about 40 years ago, as it appeared upon the whole of the evidence. The general evidence as to the mode of selling corn in this market went back to about 60 years ago, at which time some of the witnesses first recollected attending the weekly markets. The corn was then brought in bulk on horseback and in carriages, for the most part in bags, and was pitched in the market-place. Sometimes a single bag was so pitched, and the rest were left at hand in the waggon in which they had been brought there. But as far back as living memory went, if the corn so deposited in bulk, or part pitched and the rest left in the waggon on one market-day, was not then sold, instead of being taken home again by the owner, it was commonly deposited in some warehouse or inn within the city till the next market-day, when a single bag of it would be brought and pitched in the market-place to serve as a sample of the quality of the rest of it; and when sold in that manner, toll was paid for the whole quantity sold, the same as if the whole had been then pitched in the market. One old witness spoke of sales by sample in the market (i. e. sales by sample in small bags without any previous pitching of the bulk in the market-place,) having began according to his recollection about the years 1764 or 1766, and that soon after they became very general. It was

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objected, on the part of the plaintiff, that this evidence (the substance of which only is here given) did not prove, but negatived, the prescriptive claim of the corporation for toll upon a sale by sample such as had been made in the present case. But *Le Blanc* J. told the jury that the exercise of the right of taking toll for corn sold by sample for so many years back was evidence of the grant of such a toll to the corporation before time of memory: and that though the practice of selling corn by sample in small bags, without any previous pitching of the bulk of the commodity in the market-place, appeared to have grown up in modern times; yet as it appeared that as far back as between 1740 and 1750, to which the evidence went, corn which had been pitched in the market-place on one market-day, and not then

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then sold, had paid toll upon the sale of it on a future day, when the bulk of it had been removed and lodged elsewhere in the city, and only a small part, as one bag, brought into the market which was exhibited as a sample of the rest; he thought this was evidence for the jury to decide upon, whether the prescriptive grant of toll to the corporation did not include sale by sample as laid in the defendant's first special plea; and the jury accordingly found a verdict for the defendant on the first special issue.

In last *Michaelmas* term *Williams* Serjt. moved for a new trial, upon the alleged ground of the misdirection of the learned Judge, in having left it to the jury upon the facts in evidence to presume a prescriptive grant of toll to the corporation upon all corn sold by sample, as well as in bulk, when the practice of selling by sample at all, in the sense in which sales by sample are now understood, was proved to have originated within living memory. And the Court granted a rule to shew cause, in order to have the question, which was of extensive consequence, more fully discussed. And in this term [482]

The Attorney General, Dauncey, Wigley, and *Puller,* shewed cause against the rule. A right which has been exercised for between 40 and 50 years past may be presumed to have been exercised immemorially, and consequently may be presumed to have been originally granted, where a good consideration may be shewn for such a grant. It was proved that as far back as 1764 toll had been taken on corn sold in the market by sample in the present manner: and though the witnesses remembered no instances of such sales by sample prior to that period, which nearly reached the extent of living memory, it did not follow that no corn was sold in that manner before; but the jury might well presume that the practice which rapidly grew up from about that period was warranted by more ancient precedents, though not so general as afterwards prevailed; and the knowledge of such more ancient precedents at that period might have been the reason why the practice which then began to prevail more generally was submitted to for so long a time afterwards. And the acknowledged practice of selling large quantities of corn by samples of single bags alone brought into the market at the time of sale, which had prevailed as far back as living memory went, is a strong confirmation of the presumption made by the jury of a prescriptive grant of toll on all corn sold in the market by sample generally, where the bulk of it is afterwards delivered within the city. It cannot make any difference in principle whether

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whether the sale of the bulk be made by a larger or smaller bag brought into the market at the time. Then if this were evidence of such a prescriptive grant to the corporation, their providing *the public with a market-place upon their own soil, and the
[*483] obligation on them to pave and keep in repair that and other streets of the city, over which the corn might pass in its passage, would be a sufficient consideration to sustain such a grant. [Lord *Ellenborough* suggested a difficulty, that this was not claimed strictly as a market toll, but in respect of the use of those streets which the corporation keep in repair, and one of which is used as a market-place, and others for the more convenient bringing of grain into the market. And the delivery of the bulk might be in a street within the city which the corporation did not repair; so that the seller might only come in contact with the consideration for the toll by bringing his sample into the market-place.] It is not necessary that they should repair all the streets of the city; but it must at this day be presumed that they repair all which the king at the time of the grant thought it material to require them to do. They referred to *The Mayor of Carlisle* v. *Wilson* (*a*) as a stronger case of presumption in favour of a toll.

Williams Serjt., *Jervis*, *Abbott*, *Lord*, and *C. F. Williams*, contrà. A prescriptive toll on corn sold by sample is claimed by the corporation as lords of the market, and in respect of the repair of certain streets for the more convenient bringing of the corn to the market. And though general evidence of usage for 50 or 60 years, or even for a less period, be evidence, if uncontradicted, of a prescriptive grant; yet here the evidence negatived that presumption; for the beginning of the practice of selling *by sample*, in the strict sense of the term, without submitting the bulk to inspection in the market, was remembered by some of the witnesses; and it was proved that 60 years ago, before that practice began, the corn was always brought in bulk to the market and pitched there. It is true that when corn so pitched was not sold on one market day, it was used to be put in store within the city, and on the next market day only one bag would be brought into the market as a sample of the rest; and no toll was taken on the first day, because by the general rule of law the toll is only payable on the sale (*b*); but that does not establish the right of toll to the extent now claimed: for in those instances the bulk of the commodity had been once submitted to the inspection and correction of the market; all the public

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(*a*) 5 *East*, 2. (*b*) 2 *Inst.* 221.

benefit

benefit was received on the one hand, and on the other the full use of the market and streets kept in repair. Whereas here no part of the commodity has ever been pitched in the market, nor any part of it within its limits, except the small sample carried in the hand of the seller: the parties therefore have not had the benefit of the whole consideration for the toll. And the distinction between the two cases is substantial, and not merely nominal, as if it had rested upon the greater or less size of the bag which was exhibited as a sample. The evidence therefore did not warrant the finding of the first special issue for the defendant. But, 2dly, the king cannot grant a toll on corn sold by sample in the market. Toll is not of common right, nor incident to a market, nor can the king grant it after a market has been once established, without a valuable consideration (*a*). The nature of this consideration does not extend to toll on sales by sample, without ever bringing the bulk within the market; and unless the parties have the benefit of the consideration, the toll is not demandable of them (*b*). In the *Tewkesbury* case (*c*) Lord *Ellenborough*, in delivering the judgment of the Court, observes upon the essential difference between toll for corn brought in bulk into the market and sold, and such as is only sold there by sample; that in the latter case the correction of the market at the time and place of sale is wholly lost to the buyer in point of benefit: he has no benefit from the previous view of the entire bulk exposed in the market-place; nor the advantage in reduction of price, which frequently results to the buyer from the seller's dread of being obliged to carry back his commodity in bulk unsold. It was on this ground probably that *Powel* J. said, in *Kerby* v. *Wichelow* (*d*), that the king cannot grant toll on goods not brought into the market; which opinion is recognized by Lord C. B. *Comyns* (*e*). And it was considered by Lord *Kenyon*, in *Moseley* v. *Pearson* (*f*), that the grant of toll for all goods *sold* in a market, ex vi termini imported that the goods sold were brought into the market and ready to be delivered to the purchaser: and that if they were sold there *by sample*, no toll would be demandable, but the remedy, if any, was by action on the case for selling there by sample, in fraud of the lord of

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(*a*) *Ib.* 220. *Heddy* v. *Wheelhouse*, *Cro. Eliz.* 558. 591. and *Moor*, 474.

(*b*) *Haspurt* v. *Wills*, 1 *Ventr.* 71. and 1 *Mod.* 47. and *Prideaux* v. *Warne* 2 *Lev.* 96.

(*c*) 6 *East*, 461.

(*d*) 2 *Lutw.* 1502.

(*e*) 5 *Com. Dig.* 519: Toll, *E.*

(*f*) 4 *Term Rep.* 107.

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the market: and such was the opinion of the Court in *Blakey* v. *Dimsdale* (*a*).

On the question whether a grant of toll on corn sold by sample, where the bulk was never brought into the market, were good or not, Lord *Ellenborough* C. J. and the rest of the Court declined giving any opinion at present; his lordship saying that the question was on the record, and might be discussed in another shape. And at present they were only to consider whether the evidence had been properly received at the trial. Another objection was also insisted upon by the plaintiff's counsel, that the alleged consideration for the toll in the first special plea was the repair of the corn-market and *other* highways and streets in the city, for the more convenient bringing of the grain into the city to be sold there; but the claim of toll in this instance was for a sale, by sample, of corn afterwards brought *into the city*, (generally) to be delivered to the buyer; which might refer to *any part* of the city, and might therefore include a delivery in a part of the city which the corporation were not bound to repair; and therefore the prescription was ill laid, according to the case of *Trueman* v. *Walgham* (*b*). But the Court said that this objection also was upon the record.

Lord ELLENBOROUGH C. J. Without suggesting any opinion upon the questions which appear upon the record, I shall confine myself to the only question for our consideration upon the present rule, whether the evidence received at the trial were competent to be submitted to the jury in proof of the allegations contained in the first special plea. In that plea an immemorial right of toll is claimed by the corporation for corn sold in their market by sample, and afterwards brought into the city to be delivered to the buyer. This claim is not made specifically as a claim of a market toll; because it is stated that they have immemorially repaired a certain place in the city called the corn-market, and

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other highways and streets in the city for the more convenient bringing of the grain to be sold there; and that by reason of the premises they have immemorially taken the toll claimed by them. This may apply to a claim of *toll thorough*, and is not confined to a mere market toll. The only question now is, whether upon this claim so stated the jury might fairly presume from the evidence laid before them that the corporation had a prescriptive grant of such a toll. Sales *by sample* must be as old as commerce itself; and in the case of bulky commodities like corn, the

(*a*) *Cowp.* 661. (*b*) 2 *Wils.* 296.

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convenience of mankind must at all times have required an exhibition of them by sample in some manner or other; but sales by sample in a market, where the bulk of the commodity is never brought into the market at all, may be of modern introduction. If the grant were of toll on *all* sales in the market generally, that might be taken to include sales *quovis modo*, by sample or otherwise. But what is the evidence of sales by sample on which toll has been taken? It appears that from about 1764 the practice of selling by sample in the manner now used grew to be very general: but before that, and as long back as any witnesses could remember, there were occasional instances of sales by single bags in a subsequent market on which toll was taken, where the bulk of the commodity had been brought into the market on a prior day, and remaining there unsold had been removed into other parts of the city. Now though that would not prove the taking of toll on sales by sample of things *afterwards* brought into the city; yet still it would be evidence of sales *by sample*. The fact of such sales was notorious: but whether in every instance of that kind, the bulk of the commodity had actually before been pitched in the market on a prior market day might not be so certain, though the witnesses might believe that [488] it had: but for above forty years back, it is agreed that such sales had taken place without any exhibition of the commodity in bulk in the market, on which toll had been taken. Then taking the whole of this evidence together, can we say that it was not competent evidence to be left to the jury, (for that is the only question now,) to presume that the practice of taking toll on such sales had prevailed immemorially. And the jury having found in favour of the prescription as laid in the plea, I see no ground for disturbing the verdict. What the effect of such finding may be, as to the questions which arise upon the record, I give no opinion.

LE BLANC J. I thought at the trial that the evidence was sufficient to go to the jury upon the prescription, and my opinion still remains the same.

BAYLEY J. This was proper evidence to be left to the jury. The plaintiff had in truth all the benefit of the market and of the repair of the streets sustained by the corporation. The practice as it now prevails, is admitted to have existed for above 40 years; and therefore the question does not rest now on the same ground that it did in the year 1764: for after an acquiescence for so many years by those persons who were interested in resisting the claim if it had been considered to be unfounded at the time, the jury might with more reason presume that there did exist a like

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like usage before that time, though not known to the particular witnesses who were examined. Former instances of this sort might have been remembered and known to the jury, that after persons had brought part of their corn into the market and sold it there, they had contracted there to sell a larger quantity of the same kind, and for which, upon its being afterwards driven through the streets and delivered in the city, toll may have been claimed. This would properly be a sale by sample, and if the claimed of toll on the whole quantity had been submitted to, that would have warranted them in finding the fact of a prescriptive toll on sales by sample.

Rule discharged.

Wednesday Feb. 1st.

The KING *against* The Inhabitants of HORWICK.

Under a contract of hiring as a bleacher and crofter for a year at 12*s.* a-week, the servant continuing to work under such a contract for a year gained a settlement in the parish where he resided, although by the practice of the manufactory in which he was engaged, if he finished his appointed week's work, calculated at so many pieces a-day for *six* days, in less time, he had the rest of the week to do as he pleased, and he also went where he chose on *Sundays*, without asking leave: for this is an express contract for a year, without any express exception.

TWO justices by an order removed *William* and *Mary Walls*, and their children, from the township of *Horwick* to the town ship of *Heapy*, in the county of *Lancaster;* which order was quashed by the Sessions, on appeal, subject to the opinion of this Court on these facts.

The pauper *William Walls* some years ago was hired as a bleacher and crofter for a year, at the wages of 12*s.* a week, to serve Messrs. *Ainsworth* and *Booth*, whose works are at *Heapy*. This was all that passed at the time of hiring. He continued in such service for the year; residing in *Heapy*, but not in his masters' house; and was employed to do the general crofter's business. In these works each bleacher is directed by his masters to get up a certain number of peices within the week. The task set is calculated at the rate of so many pieces a day for six days. The man is not stinted to hours; if he finish his work in less than the time appointed, the rest of the time is his own, to do as he pleases: if he do more than the appointed work, he receives for over work. Having *neglected his work in the week days, the pauper has occasionally made up for his loss of time by working on *Sundays;* but this was his own act and deed. The pauper on *Sundays* went where he pleased, without asking his masters' leave. Messrs. *Ainsworth* and *Booth* never engaged or employed their bleachers to work on *Sundays:* they had nothing to do with them on *Sunday*. In respect of their servants who were

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hired for other purposes, they were occasionally put to work on *Sundays*, but when they were so, they were allowed something for it. The Sessions were of opinion that under these circumstances, and from the nature of the trade, the pauper was not under such control of his masters, that he could be considered to have gained a settlement in *Heapy* under such hiring and service.

Yates, in support of the order of Sessions, contended that this was not a hiring for a year; *Sundays* being in effect excepted out of the contract; which brought this within the former cases of *Rex* v. *Macclesfield* (*a*), *Rex* v. *Kingswinford* (*b*), and *Rex* v. *North Nibley* (*c*); in which latter the hiring, being "for five years as a colt shearman, to work 12 hours each day." was considered as an implied exception of the other 12 hours in each day, and the whole of *Sundays*. And he endeavoured to distinguish this from the cases of *The King* v. *St. Agnes* (*d*), and *The King* v. *Birmingham* (*e*), where the absence of the servant from his work on holidays and *Sundays* in the one case, and on other occasions in the other, was protected by the custom of the country.

Scarlett contra was stopped by the Court. [491]

Lord ELLENBOROUGH C. J. If the argument be pushed to the extreme, there is not any contract of hiring in which there is not some implied exception. The law of the land breaks in upon such contracts as these on the *Sundays*; and the master in this case had as much right to the service of the pauper for the whole year as the law of the land will allow of. The distinction however is clear between this and the cases relied on. Here is an express hiring for a year, and no express exception in the contract of any part of the year. But this is an attempt to introduce an impiled exception from the practice of the particular house of manufacture in which the servant was engaged; though implied exceptions in the times of service by the custom of the country have been held not to break in upon general contracts of hiring for the year.

Per Curiam, Order of Sessions quashed.

(*a*) *Burr. S. C.* 458.
(*b*) 4 *Term Rep.* 219.
(*c*) 5 *Term Rep.* 21.
(*d*) *Burr. S. C.* 671.
(*e*) *Cald* 77. and *Dougl.* 333.

The

Wednesday, Feb. 1st.

The KING *against* The Inhabitants of OAKLEY.

A guardian in socage, residing on the ward's estate for 40 days, gains a settlement in the parish; and cannot be removed from the possession of it at any time.

UPON an appeal against an order of justices removing *John King* and *Mary* his wife from *Brill* to *Oakley*, both in the county of *Bucks*, the Sessions confirmed the order, subject to the opinion of this Court on these facts.

Thomas Hawes about 38 years ago inclosed a piece of waste land in the parish of *Brill*, and built a cottage thereon, which he occupied till his death. By indenture, dated the 3d of *November* 1795, he and his son *Thomas* demised the cottage to *James Hawes* for a term of 500* years, by way of mortgage, for securing 20*l.* and interest, which yet remains unsatisfied. *Thomas*, the son, afterwards married the pauper *Mary*, and resided in the cottage with his father until *June* 1801, when *Thomas* the father died intestate; leaving his said son in heir at law; who continued to reside on the estate till *November* in the same year, when he died intestate; leaving the pauper *Mary* his widow and four infant daughteas, three of whom, at the time of the removal, were under 14 years of age. The widow continued, with her daughters, to reside on the said estate for more than 40 days (as it was afterwards agreed) after the death of her husband, before her eldest daughter attained the age of 14; and in *October* 1106 the widow intermarried with the pauper *John King*, whose legal settlement was in the parish of *Oakley*, and who, together with his said wife and her children, resided on the said estate from the time of the said marriage to the time of the removal. The estate at the time of the removal was of a less annual value than 10*l.* It was admitted by the counsel for the appellants, that *Mary King* had gained no settlement by any right of dower in the said estate. The questions intended to be submitted to the Court were, first, whether *John* and *Mary King*, or either of them, gained a settlement by their respective residence on the estate as above stated? Secondly, Whether *Mary King* communicated any settlement gained by her residence before her marriage to her husband *John King?* Thirdly, Whether both or either of them, were irremovable at the time of the order of removal.

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The Attorney-General and *Best*, in support of the order of Sessions, argued on the first point only; that the widow did not gain

gain a settlement by residing for 40 days on * this estate as guardian in socage to her children, the heirs of her deceased husband. They admitted that it was not necessary to the acquiring of a settlement by 40 days residence on an estate, that the party should have a beneficial interest in it at the time; as in the case of *The King* v. *Stone (a)*, where an executor who held in trust for the widow during her life gained a settlement by such residence. But they said it was necessary to confer a settlement by residence on a party's own estate that he should have either a legal or a beneficial interest in it: and they denied that a guardian in socage had any legal interest in the property of the ward or heir, or any right to reside upon it suo jure, or otherwise than as the servant or bailiff of the ward *(b)*. A guardian in socage takes no interest in the land, but is only to take the issues and profits to the use of the heir, to whom he is to account at the age of 14 *(c)*. Therefore he may be sworn for his ward *(d)*. And though such a guardian may lease the ward's land in his own name, yet that is by virtue of the power or authority conferred on him by law. And they distinguished between the case of a guardian in socage and that of an executor or administrator, the latter of whom takes the whole legal interest in all real chattels, and may maintain trespass for injuries to the land, and recover the profits, if withheld, in their own names, as the only owners whom the law recognizes; and, what is most to the point, they may dispose of all the interest at law, and make a good title to a bonâ fide purchaser; and in no case are they accountable at law to the beneficial owner for the profits of the estate. But a guardian in socage is accountable at law to his ward in an action of account, and cannot make a title to a purchaser.

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W. E. Taunton, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. There is no doubt in this case but that the mother, who was guardian in socage to her daughters, had a right to elect whether she would let the estate or occupy it for their benefit: and unless she let it, the law, which imposes the duty of a guardian upon her, would necessarily protect her in the personal occupation and superintendance of it. The only difference which can be pointed out between the cases of an executor or administrator and of a guardian in socage, in this respect, is that the one is accountable for the profits by statute, and the other at common law. The law considers a

(a) 6 *Term Rep.* 295,
(b) *Co. Lit.* 89. *a.*
(c) *Ib.* 88. *b.*
(d) *Gilb. Evid.* 107.

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guardian in socage as entitled to the possession of the ward's property, and incapable of being removed from it by any person. Such a guardian has not a mere office or authority, but an interest in the ward's estate. It is laid down in *Wade* v. *Baker*, 1 *Ld. Ray.* 131. that he may maintain trespass and ejectment, avow for damage feasant, make admittance to copyhold and lease in his own name. He cannot indeed convey the property absolutely as an executor or administrator, because the nature of the trust does not require it in the one case as it does in the other; but he may dispose of it during his guardianship, though accountable afterwards to the heir. The widow therefore had such an interest in the estate as rendered her irremoveable from it.

GROSE J. The question is, Whether the widow was irremove-
[495] able from this property for 40 days? She had a right during her guardianship either to lease or occupy the estate; and if she chose to occupy it, she was irremovable from it, as from her own, though liable to answer afterwards to the wards for the profits.

LE BLANC J. The case, though new in circumstance, is not now new in principle. It is governed by the decisions which have taken place, that in order to make persons irremovable on account of having property in the parish, it is not necessary to have a beneficial interest in it for themselves, but it is sufficient that they reside there for some beneficial purpose to another. Now a guardian in socage has a right to the possession, and until she leases, it is for the interest of the wards that she should occupy the estate, and there can be no right to remove her from it to their prejudice: as in the case of an administrator, or of a sole next of kin even before administration granted, who has a right to reside on the leasehold property; and such residence for 40 days will give him a settlement in the parish.

BAYLEY J. If a guardian in socage can maintain trespass and ejectment in his own name, and avow for damage feasant on the land, this shews that he has a right to occupy it. And this is confirmed by the old method of pleading by guardian in socage, which was that he entered as guardian into the tenement in question, and was possessed. In like manner an administrator has a right to the possession of leasehold property, and is only accountable for the profits.

Order of Sessions quashed *(a)*.

(a) Vide *Osborn* v. *Carden*, *Plow.* 293. where the Court consider that *the whole estate and interest* of the lands is in the guardian in socage, (which must

must be understood during the guardianship) to the use of the infant. And in *Bedell* v. *Constable*, *Vaugh.* 182, 3. he is said to have an *interest*, and not merely a naked authority, though it be an interest joined with a trust for his ward.

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The KING *against* The Inhabitants of STOKE-UPON-TRENT.

Wednesday Feb. 1st.

Renting the hire or privilege of milking two cows belonging to another at so much per week per cow, for 40 weeks, which cows were to be *depastured* by the owner on his farm in common with his other cattle, and were to be milked by the pauper, will gain him a settlement if the pasturage of the two cows be worth 10*l.* a-year.

TWO justices by their order removed *Richard* and *Elizabeth Sheldon* and their three children by name, from *Stoke-upon-Trent* to *Norton-on-the-Moors* in the county of *Stafford*. The Sessions, on appeal, quashed the order; subject to the opinion of this Court on these facts.

The pauper *Richard Sheldon*, being legally settled elsewhere, about seven years ago, under a verbal agreement, rented and paid for the hire or privilege of milking two cows belonging to Mr. *Repton* the sum of 5*s.* 6*d.* a week each cow, for forty successive weeks. The two cows were by the terms of the agreement to be depastured by Mr. *Repton* on his farm at *Norton-on-the-Moors*, in common with his other cows; and were in fact depastured on such of the lands belonging to the farm as Mr. *Repton* thought proper, in common with his other cattle. The pauper never went on the lands to fetch them; but they were regularly brought up with Mr. *Repton*'s other cows to the fold yard, and there milked by the pauper and his family. During the time the pauper so rented the said cows he resided in the parish of *Norton-on-the-Moors*, at a cottage for which he paid fifty shillings a year: and the depasturing of the two cows for the time aforesaid on the lands of Mr. *Repton* was, together with the cottage, worth more than ten pounds a year. The question was, whether the pauper gained a settlement in *Norton-on-the Moors* by his renting of the cottage and of the cows as above stated.

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Clifford and *Peake*, in support of the order of Sessions, said that this was no more than a personal contract for the hire and privilege of milking two cows, and no tenement, which must lie in tenure and relate to land. The rule of law as laid down in *The King* v. *Lockerley* (*a*), that an agreement for the use and

(*a*) *Burr. S. C.* 315.

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feeding of cows is no tenement within the act, is correct: the error of that case lies in the misapplication of that rule to the facts of it; for there the dairyman took not only the cows and their feeding, but also the dwelling-house and the after-math of part of the ground, &c. and in short the whole dairy farm. And in *Rex* v. *Whixley* (*a*) *Buller* J. said that the best reason for that decision seemed to be that part of it where the Court held that it was not a lease of land, or any thing out of land; for it was only a right to the milk of the cows. And in *Rex* v. *Stoke* (*b*) the taking of hay, grass, and after-math was held to confer a settlement, because the *land* was intended to pass. In *The King* v. *Piddletrentide* (*c*), in which *Rex* v. *Lockerley* was over-ruled, the specific subject of letting was a *dairy*, which in dairy countries means the land itself on which the cows are fed, as well as the use of the cows; and the lessee had also the liberty of cutting furze on the farm for the use of the dairy; he had also a rabbit-warren, and a house on it to keep the nets in: so that he had evidently an interest in the soil beyond the mere use and feeding of the
[498] cattle. And *Buller* J. there stated the true question to be, "whether it were a contract to receive profits out of land." Next came *The King* v. *Tolpuddle* (*d*) where by the terms of the contract the pauper was to have the *exclusive* right of feeding the dairy cows in certain closes for part of the year. He was also to have a dwelling-house on the farm, and the right of cutting fuel for the use of the dairy. There was a clear interest taken in the land. Lord *Kenyon* laid stress on the pauper's having for a part of the year the exclusive right to the pasturage of the grounds to be taken by the mouths of the cattle. *Ashhurst* J. observed, that the pauper had the separate possession of a house, and that he rented not merely the milk of the cows, but the cows themselves, and the land under certain qualifications; for he had a right in certain closes even to the exclusion of the farmer himself. And *Buller* J. said that he had an interest in the land: and he also relied on the pauper's exclusive possession of particular grounds during part of the year. It is true that in *The King* v. *Hollington* (*e*) the pauper was holden to gain a settlement by renting the pasturage of two cows in a certain close for a part of the year, though his cows had not the exclusive feeding of it; but there the cows were the pauper's own; which was relied on

(*a*) 1 *Term Rep.* 138.
(*b*) 2 *Term Rep.* 451.
(*c*) 3 *Term Rep.* 772.
(*d*) 4 *Term Rep.* 671.
(*e*) 3 *East*, 113.

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by Mr. Justice *Lawrence*, as falling within the words of Lord *Kenyon* in the case of *Piddletrentide*, that it was "a contract for the pernancy of the profits of the land by the mouths of the cattle." And Lord *Ellenborough* compared it to the taking of a common in gross, which had been determined to confer a settlement in *Rex* v. *Dersingham* (*a*). In *Rex* v. *Minworth* (*b*) also the pauper had the exclusive possession of the land on which the dairy cows were agreed to be depastured; but there no settlement was gained, because the annual value of the *land* was not 10*l*. This species of contract for the run of cattle in the pasture of another was held to be no tenement in *The King* v. *Hammersmith* (*c*); (for having the privilege of feeding there for nothing could make no difference in that respect) because it conferred no interest in the land. If a contract for taking the milk of cows will confer a settlement, because the cattle must necessarily feed on the land in the mean time, the same consequence may be pursued to a contract for taking all the cheese of a farm made during a certain period. In *Lancashire*, geese are kept in large flocks for the sake, in part, of their feathers, and are turned out into the stubbles for a certain period; and a contract for taking all the feathers of the geese while kept there would by the same rule, be a taking of a tenement. Here the gist of the contract is specifically for the hire and privilege of milking the cows of another for a certain period: the place and manner of their feeding are collateral to such contract, and such as the owner would have provided for the sake of his own cattle in order to make their milk most productive, if he had milked them on his own account. The cows were to be depastured in common with the owner's own cattle wherever he pleased on his farm; and the pauper had no other control over them than the privilege of milking them. It was said by *Lawrence* J. in *Rex* v. *Disbury* (*d*), that a contract to feed cows generally, under which they might be fed with green tares bought in the market, would not be a tenement.

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Puller and *Petit*, contrà, were stopped by the Court.

Lord ELLENBOROUGH C. J. There is no solid distinction between this and the case of *Hollington*. There the pauper had only hired the depasturing of his own cows in common with the cattle of the owner in certain land; here he hired the cows themselves, which for this purpose are the same as his own together

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(*a*) 7 *Term. Rep.* 671.
(*b*) 2 *East.* 191.
(*c*) 8 *Term Rep.* 450. note
(*d*) M. 43 G. 3. 1 *Nola* 506.

with

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with their depasturing in common with the owner's other cattle, upon a certain farm; all included in one contract. If the cows here had been the pauper's own, this case would have been identically the same as the former; but that fact was no material ingredient in the former case; for the cows are his own for the time that he hires them; and in some of the other cases where settlements were obtained under contracts of this kind, the cows were hired as well as their feeding. Therefore, without going at large into the general question which was agitated in those cases, I think that, consistently with the decisions, this must be deemed to be the taking of a tenement.

GROSE J. It is too late now to unsettle the law which has been established by former decisions. It is said that this is only a contract for a right to milk cows: but it is more; for it is a contract to take the milk of cows to be depastured on a certain farm; which is purchasing pro tanto the interest in those pastures on which the cows were to be fed. And this falls within the former decisions on the renting of dairies.

LE BLANC J. It is only the words used in stating this case which make any real difference between it and former cases; but it falls within the same principle. The only difference between this and *The King* v. *Priddletrentide* is that there it was stated to
[501] be the renting of a *dairy*, which is only a contract for the hire and privilege of milking cows, which during the time are to be depastured on the owner's lands. But there the cows were to feed in particular grounds at particular seasons of the year; and here they were to be depastured on the farm in common with the owner's other cattle. In *The King* v. *Tolpuddle* the agreement was, as here, for the owner's cows at so much a head; and though they were to have the exclusive pasturage of certain grounds during part of the year, yet that has since been held to make no difference. "If," said Lord *Kenyon* in the latter case, "the cattle had been the pauper's own, and he had rented the feeding of them, that would have been unquestionably a tenement; like the taking of the pasture, the hay, and after-math; and I think that these were the pauper's for a certain period, &c.; and this was not the less a taking of a tenement, because the pauper could only enjoy the land in a particular mode." The same reasoning will apply to this case. In *The King* v. *Minworth* there was no doubt made but that the contract was for the taking of a tenement; but the value of the land on which the two cows were to be depastured did not amount to 10*l.* a year, and therefore no settlement was gained. Now here the pauper contracted

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The KING *against* The Inhabitants of STOKE-UPON-TRENT.

contracted for the milking of two specific cows (not any two cows) which were to be depastured on the farm of the owner together with his other cattle; the value of which pasturage, together with the cottage rented by the pauper during the same time, amounted to more than 10*l.* a year. Then it was decided in *The King* v. *Hollington*, that hiring the feeding of cows for a certain time, in common with the cattle of the owner of the pasture in which they are to be fed, is a taking of a tenement. This then is the same as if the pauper had hired the cows at so much. and the pasture for feeding them at so much more, though the two sums are compounded in one. And it being found here that the value of the pasturage, together with the cottage, amounted to 10*l.* a year, the pauper gained a settlement.

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BAYLEY J. This is a hiring of two cows, with the right of having them depastured on lands in the parish. The cases of *Piddletrentide* and *Tolpuddle* determined that it was not necessary that the cows should be the pauper's own; and the case of *Hollington* determined that the pauper need not have the right to the pasturage exclusive of the cattle of other persons. Those three cases, therefore, have decided the present. The agreement here was that the owner should *depasture* the cows upon his farm in the parish; which must mean that they were to be fed on the pasture growing on the land: if, therefore, he had fed them in any other way, it would have been a breach of his contract.

Order of Sessions quashed.

MEREDITH

Friday, Feb. 3d.

MEREDITH and Others *against* MEREDITH and Another.

Under a devise to *H.* of certain tenements by name for her life; provided that if *S.* and *A.* [to whom and to whose children the reversion and inheritance of the premises were intended if *H.* should die without issue] should *give H.* 1000*l.* for her life estate, then the testator devised all and singular the said estate and premises called, &c. to *S.* and *A.* for their lives, share and share alike; and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common, &c. Provided that *if H. should die in possession of the premises* single and without issue, then he gave the said estates and premises to *S. and A. and to the issue of their bodies lawfully begotten, or to be begotten, and their heirs, as tenants in common* AS AFORESAID: held that the words *as aforesaid* drew down to the second clause the limitations of the first, and shewed that the testator meant that *S.* and *A.* and their children should take the same estates on *H.* dying in possession without issue, as they would have done if the 1000*l.* had been paid; and held also, that a younger child of *A.* born after the death of the testator and before the death of *H*, or of *S.* (who died without issue) was entitled to share in the moities both of *S.* and of *A.*; and that the eldest son of *A.* was also entitled to share in both moities, though he died before *A.*; and on his death his share in *S.*'s moiety descended immediately to his next brother and heir at law, as did also his share in *A.*'s moiety, on her death after him.

CHARLES NEWCOMB being seised in fee of the estates in question in *Herefordshire*, by his will dated the 8th of *November* 1760, duly executed and attested, devised (inter alia) as follows: "Also I give and devise to my daughter *Hannah* "*Newcomb* the tenements called *Llitton*, in the parishes of *Dis-* "*coyd* and *Presteigne* in the county of *Hereford*, &c. and the "tenement called the *Bower* in the parish of *Kington* in the "said county, with all the lands, &c. thereunto respectively "belonging; to hold unto my said daughter *Hannah* during her "natural life, without impeachment of waste. Provided, that "if my son *Spencer Newcomb*, and my daughter *Ann* the wife of "*John Meredith, to whom and to whose children I intend the* "*reversion and inheritance of the said lands and premises upon* "*the estate for life of my said daughter* Hannah *being determined,* "*in case* Hannah *shall die without issue of her body lawfully be-* "*gotten*, shall be minded to pay the said *Hannah* 1000*l.* as and "for a consideration for her estate for life in the said premises; "then and on full payment thereof I give and devise all and "singular the said estate and premises, called *Llitton*, and the "*Bower* hereinbefore mentioned and intended to be devised to "*my said daughter for her life, as aforesaid, and every part and "parcel thereof, to my said son *Spencer Newcomb* and *Ann* "*Meredith* my daughter, during their natural lives; the profits "whereof to be equally divided between them, share and share "alike. And from and after the decease of the first of them so "dying, I give and devise the moiety part or share of him or "her, so dying, unto and among the child or children of him "or her, so dying, and his, her, or their heirs; remaining part "or share to the survivor of them, the said *Spencer* and *Ann*, and "his or her issue lawfully begotten, equally to be divided be-

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" tween them, share and share alike. And in case my said son " *Spencer* shall not marry and have issue, then I give and de- " vise his moiety of all and singular the said lands, &c. after " his life, and the reversion and inheritance thereof, unto and " amongst the child or children of my said daughter *Ann*, by " *John Meredith* her husband begotten or to be begotten, and " his and their heirs for ever, to be equally divided between " them, as tenant in common, and not as joint tenants. Pro- " vided, that if my said daughter *Hannah* shall die in possession " of the said premises single and unmarried, and without any " lawful issue of her body; then I give and devise the said " estates and premises called *Litton* and the *Bower* to my son " *Spencer* and my daughter *Ann*, and to the issue of their bodies " lawfully begotten or to be begotten, and their heirs, to take as " tenants in common and not as joint tenants, *as aforesaid*. But " if my daughter *Hannah* shall marry and have issue, then I do " hereby revoke the devise hereinbefore made to her for life, as " aforesaid, and all and every the limitations made thereupon; " and I do give and devise all and singular the said estates and " premises to her the said *Hannah Newcomb* and the heirs of her [505] " body lawfully issuing for ever, any thing herein contained to " the contrary thereof in any wise notwithstanding."

The testator died some time after making his will; leaving *Spencer Newcomb* his only son, and his two daughters, *Hannah Newcomb* and *Ann Meredith*, and *John Meredith* since deceased, the defendant *Thomas Meredith* and the plaintiffs *Charles Meredith*, and *William Meredith*, and *Edward Meredith*, the then five only children of his daughter *Ann Meredith*, him surviving. And after the testator's death, but during *Spencer Newcomb*'s life-time, *Ann Meredith* had only one other child by her husband. *Spencer Newcomb* and *Ann Meredith* did not pay *Hannah Newcomb* the 1000*l.* in the will mentioned for her life estate; and *Hannah Newcomb* upon the testator's death entered into the possession of the said estates, and continued so till her death. *Spencer Newcomb* died in 1767, unmarried and intestate; leaving *Hannah Newcomb* and *Ann Meredith* his co-heiresses, and co-heiresses of the testator. *Hannah Newcomb* died in 1783, unmarried and intestate; leaving *Ann Meredith* her sister and heiress her surviving; whose eldest son *John Meredith* died in 1787, intestate and unmarried; leaving his next brother *Thomas Meredith* his heir at law; which *Thomas* is now the heir at law of the testator *Charles Newcomb*, and of *Spencer Newcomb* and *Hannah Newcomb*. *Ann Meredith* died in 1800, intestate; leaving

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ving *Thomas* her then eldest son, and *Charles*, *William*, and *Edward Meredith*, and *Spencer Newcomb Meredith*, her only other children her surviving, and who are all now living. *John Meredith*, the husband of *Ann*, survived her, but is since dead. *Charles*, *William*, and *Edward Meredith*, exhibited their bill in Chancery against *Thomas Meredith* and *S. N. Meredith*; praying that the shares and proportions belonging to the plaintiffs and defendants in the said devised estates might be ascertained and settled, and that a partition of them be made accordingly under the decree of that Court: to which bill the defendants appeared and put in their answer; and on hearing of the cause, the Master of the Rolls directed this case to be stated for the opinion of this Court upon the following question: What shares and interests *Thomas*, *Charles*, *William*, *Edward*, and *Spencer Newcomb Meredith*, the children of *Ann Meredith*, took and are now entitled to, in the estates in question, under the will of *Charles Newcomb*?

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Wetherell, for the plaintiffs, contended that the second clause or proviso in the will, which applies to *Hannah Newcomb*'s dying in possession of the estates, must be coupled with the first clause, and particularly by reason of the words *as aforesaid* which are used at the end of the second clause: and that the testator intended by the second clause that *Spencer Newcomb* and *Ann Meredith* respectively, and their children, should take the same interests in the event of *Hannah Newcomb*'s dying in possession, as are expressed in the first clause in the event of the 1000*l.* being paid to her. And consequently that under the limitations expressed in the first clause *Spencer Newcomb* and *Ann Meredith* took estates for life, as tenants in common, with remainders to their respective children as tenants in common in fee of a moiety; with a remainder over of *Spencer Newcomb*'s moiety on failure of his children to the children of *Ann Meredith* as tenants in common in fee. According to which construction, in the events which have happened, *Thomas Meredith* in his own original right, and as heir of his brother *John* (if *John* were entitled to share), is now entitled to 2-6th of each moiety in fee, and each of the other children is entitled to 1-6th in each moiety in fee. But if *John* were not entitled, then they would all share equally. As grounds for this construction he urged, 1st, the words of relation *(as aforesaid)* in the second clause to the first, which could only refer to the limitations to the same parties, and for the same estates, in the event of *Hannah Newcomb*'s dying in possession, as if she had been bought out by what the testator deemed an equivalent for her life estate: and a

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devise may be as effectual by words of relation as by express words; as in *Lisle* v. *Gray* (*a*), *Lowe* v. *Davies* (*b*), and other cases. 2dly, Every word of the will by this construction will have its effect, and there will be no contradiction between the two clauses. 3dly, The probability of the testator's intention is in favour of it, because this construction accords with his general intent before expressed in the first clause: and this absurdity would follow from a different construction, that if the parents chose to pay the 1000*l.*, the children would take immediate vested remainders in fee after the life estates of the parents; but if the parents did not pay the money, they themselves would take a greater estate, and the children would take no interest but what their parents might deprive them of. He next submitted whether *Thomas*, the brother and heir of *John Meredith*, was entitled to *John's* share, *John* having died before his mother and before the period of division. But he admitted that *S. N. Meredith* the youngest son of *Ann Meredith* was entitled to share with the other children, though born after the death of the testator, being born before the period of division arrived; and cited *Ellison* v. *Airey* (*c*). *John Meredith* the son of *Ann* was living at the death of the testator, and of his uncle *Spencer Newcomb*, and of his aunt *Hannah*, but died before his mother: and there may seem to be an inconsistency in letting in children born at any time before the period of division, and yet retaining in those who die before that period, whose shares are thus liable to be altered after their deaths; but though the share may be vested in interest, yet it need not be vested in quantity, but be liable in this respect to be varied by letting in after-born children. In *Baldwin* v. *Karver* (*d*), though the grand-children were all living at the time of the distribution, and therefore this question did not necessarily arise, yet it seems by the certificate that the Court meant to say, that being alive at the time of distribution was necessary to enable them to take.

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Abbott, on behalf of the defendant *Thomas Meredith*, submitted that as the 1000*l.* was not paid to *Hannah Newcomb*, the limitation contained in the first proviso of the will did not take effect at all, but gave way to the other distinct limitation in the second proviso; under which *Spencer Newcomb* and *Ann Meredith* (the son and daughter of the testator) were entitled in remainder, after *Hannah's* death, to several estates for life, in undivided moities, with several remainders to their respective chil-

(*a*) 2 *Lev.* 223. (*b*) 2 *Ld. Ray.* 1561.
(*c*) 1 *Ves.* 111. (*d*) *Cowp.* 309.

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dren, as tenants in common in fee of the parent's moiety; and *Spencer Newcomb* never having had any children, the defendant *Thomas Meredith* is now entitled to the whole of his moiety, as his heir at law, and also to 2-6ths of *Ann*'s moiety. Or that at any rate, under this limitation, *Spencer* and *Ann* were each entitled to an estate tail in a moiety, and that *Thomas Meredith* is now entitled to one moiety in fee and to the other moiety in tail. He suggested that in the events which had happened, of *Hannah*'s being permitted to remain in possession till her death, and *Spencer*'s dying without issue, the testator might have considered that it was sufficient to let the younger children of *Ann* share in her moiety, and leave the other moiety to go to the eldest son and heir: although if *Ann* and *Spencer* agreed to buy out the life estate of *Hannah*, who was the first object of the testator's bounty, the estate should go in moieties respectively to all their children. The second clause, he contended, had no relation to the first, except as the words *as aforesaid* might be construed to mean that *Spencer Newcomb* and *Ann Meredith* and their respective children were to take (if at all) as tenants in common of their respective moieties: all beyond that is mere conjecture. If *Hannah* had issue, the testator revoked all his former devises to the others; and though *Spencer* and *Ann* had bought out *Hannah*, yet if she had issue afterwards, it could only have concluded her life estate, but not the interest of her children. If he had intended that the same consequence should ensue in both the events, he would have provided for it in one clause, "if *Hannah* shall die single and without issue," or, if *Spencer* and *Ann* shall pay her 1000*l*., then I devise, &c.

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Lord ELLENBOROUGH C. J. If the words of reference, "*as aforesaid*," meant any thing, they must have the meaning which the plaintiff's counsel have given to them: and no sound reason can be suggested why the testator should have intended to make a difference in the estates which the children were to take, whether the parents bought out *Hannah* or not: and if they did buy her out, he does not devise over merely her life estate, but "all and singular the said *estate and premises called* Llitton *and the* Bower, &c. Then the words *as aforesaid* in the latter clause necessarily draw down and incorporate the words in the former clause: his son *Spencer* and his daughter *Ann* and their issue, &c. are to take, in the event of *Hannah* dying in possession unmarried and without issue, as tenants in common *as aforesaid*. To say that these latter words only meant that they were to take as tenants in common in their respective moieties, is to give no meaning

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meaning to the words *as aforesaid*, but to make them a mere useless repetition; but it is always desirable, if possible, to give effect to all the words of a will, and particularly when it enables the Court to give a uniform and consistent sense to the whole will. Then, on the death of *Spencer*, *John's* interest was vested, and went on his death to his brother *Thomas*. We will certify our opinions.

Afterwards the following certificate was sent to his Honour:

This case has been argued before us by counsel: we have considered it, and are of opinion that upon the true construction of this will, *Spencer Newcomb*, and *Ann Meredith*, respectively, and their children, were to take the same estates upon *Hannah Newcomb's* dying without issue, as they would have done had the 1000*l.* been paid; and consequently that *Thomas Meredith* is entitled to one-sixth part in the above-mentioned estates as heir to his brother *John Meredith* in fee; that he is entitled to one other sixth in fee in his own right; that *Charles Meredith*, *William Meredith*, *Edward Meredith*, and *Spencer Newcomb Meredith*, are entitled to one-sixth each in fee; and that the said parties are tenants in common, and not joint tenants.

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N. GROSE.
S. LE BLANC.
J. BAYLEY.

The KING *against* MITCHELL.

Friday, Feb. 3d.

THIS was an information in nature of a quo warranto against the defendant, for usurping the office of a common councilman of the city of *Norwich*, to which he pleaded (inter alia) that by charter of the 21st of *July*, 5 *Hen.* 5 the king granted that the citizens and commonalty of the city should annually elect 60 of the citizens for the common council out of the four wards of the city; and that the citizens *inhabiting* in the ward of *Wymer* should, on a certain day after *Passion Sunday*, be at the

Freemen of *Norwich*, substitutes in the militia, quartered at *Colchester*, but having dwelling Houses in *Norwich*, in which their families resided, and to which they at times resorted on furlough, (in some instances, within the last six months, only for the purpose of voting at elections,) held to be inhabitants within the charter of *Norwich*, and a local act requiring them to have been inhabitants for six calendar months previous to certain elections of corporate officers, in order to qualify them to vote.

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Guildhall, and they, or the major part, should elect 20 discreet and sufficient persons of the ward to be common councilmen for the year ensuing. And that by stat. 3 *Geo.* 2. it was enacted that for the future no more than 3 common councilmen of each great ward should be yearly elected by the freemen of each great ward. That on the 18th of *March* 1807 the citizens of the ward of *Wymer* were convened to elect 3 common councilmen; and that the defendant and several others were candidates. That the numbers at the election were, for *Forster* 255, for the defendant 229; for *Staff* 227; for *Proctor* 226; &c. and that the defendant was declared duly elected, and took the oaths, and was admitted into the office. The prosecutor replied that the defendant was not duly elected. At the trial before the Lord Ch. Justice of *C. B.*; it being understood between the parties that the validity of *Mitchell's* election depended upon the votes of 4 freemen of the ward of *Wymer*, named *Jessop*, *Lucas*, *Funnel*, and *Emms*, whose votes were objected to on the ground that they were not *inhabitants* within the ward *six calendar months before the election*, according to the oath required to be taken by the stat. 3 *Geo.* 2.; the counsel for the defendant proceeded to examine witnesses to prove the inhabitancy of those 4 persons. 1st, *Jessop* proved that he was a substitute in the *Norfolk* militia for 3 years and a half before the election, rented a house in *Wymer* ward at the rent of 2*l.* 12*s.* a year, in which his wife and child continued to live all the time, and whither he repaired many times after he went into the militia. He was at home there on furlough for 22 days about the beginning of 1806; and went there again on the 14th of *October* 1806, and staid six weeks; and again at *Christmas* 1807, when he continued there 15 days, and returned there again on the 25th of *February* 1807, and staid till the 23d of *March*. On the 18th of the same month the election took place. During all these times he dwelt at his own house. He also attended the election at *Norwich* for members to serve in parliament in *November* 1806, and had his leave of absence afterwards prolonged. The house which he rented was not rated to the poor. 2. *Lucas*, another freeman who voted for the defendant, was also a substitute in the *Norfolk* militia, and had been so for 3 years before, during all which time he had a small house in *Wymer* ward, which he rented by the quarter, in which his wife and children continued to live. He went home 3 days before the election in 1807, and staid there 14 days. He was also there for 14 days on furlough about *Christmas* 1804, again after the *Christmas* following for 21 days, and again in *December*

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December 1806. He was again in *Norwich* 4 days before the election in *March* 1807, and staid 21 days, and again in *November* for 15 days, and again at the election in *March* 1808 for 17 days. At all other times he continued with his regiment; and when he was at *Norwich* he always lived with his wife and children at his house. At the time of the election in question, he came there for no other purpose than to vote; and in *October* 1806 he went there for the purpose of voting at the then next general election. The 3d voter, *Funnell*, had a wife and children, and had lived at different houses in *Wymer* ward for 10 years; and had been a substitute in the militia for 5 years from *August* 1803. He went home to his family at *Christmas* 1803, on furlough for 3 weeks, and at the following *Christmas* for 15 days, and for the like period at the beginning of 1806. He also had a pass for 10 days at the general election in *November* 1806, and a furlough for 15 days longer, and was again at home for 15 days at *Christmas* 1806. He was at the election in *March* 1807 on furlough for 12 or 14 days; and again at home at *Christmas* 1807. His wife and family lived in his house during all the time, and he was at home with them on these occasions. *Emms*, the 4th voter, was also a substitute in the *Norfolk* militia about 5 years and a half before, and had a wife. In *January* 1806, having before lived in *Norwich*, he took a house in *Wymer* ward of the defendant at 38*s*. a year; and kept it for a year and a quarter. It was not rated to the poor. His wife lived in it till the 28th of *February* 1807, and then went to *Colchester* to see him for a few days, and had remained there ever since. She left furniture in the house and brought away the key. *Emms* went to the election in question with a pass; arrived at *Norwich* 3 or 4 days before the election, and resided at his father's house in *Wymer* ward. After the election he took the furniture out of his house and carried it to his father's. He remained in *Norwich* some days after the election. He went to *Norwich* with a pass at the time of the general election in *November* 1806, but was not in *Norwich* again till he came to vote for the defendant. During the period spoken to by these witnesses, it appeared that the regiment to which they belonged was quartered at *Colchester;* and it was admitted that they had taken the oath prescribed by the act of the 3 *Geo.* 2. *c.* 8. after-mentioned. And evidence of usage was offered, that persons so circumstanced had always been admitted to vote; but this evidence was rejected by the Chief Justice of *C. B.* A verdict was by consent taken for the Crown, with liberty for the defendant to move to set it aside, in order

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that the opinion of the Court might be taken, whether under the stat. 3 *Geo.* 2. *c.* 8. the several persons mentioned had a right to vote in the election of the defendant.

Sellon Serj. (with whom were *Dampier* and *Best*) accordingly moved in the last term that the verdict should be set aside, and a verdict entered for the defendant, on the ground that the acts regulating the constitution and right of election for corporate offices in *Norwich*, which speaks of *inhabitants*, must be construed with reference to the general law respecting inhabitancy; and that these several voters were in that sense *inhabitants* of *Norwich* at the time of the election in question.

[515] "The stat. *Geo.* 2. *c.* 8. for regulating elections in the city of *Norwich* enacts (*s.* 3) that "In case of any election of any "alderman or common councilman for the said city, every per- "son, (except such as are and shall be placed in any of the hos- "pitals or workhouses of the said city, or are or shall be pri- "soners for debt in the common gaol or other prisons of the said "city), before he is admitted to poll at such election, shall, in- "stead of the oath or affirmation required by the stat. 9 *Geo.* I. "*c.* 9. take the following oath, &c.: You do swear that you "are, and for 12 calendar months have been, admitted a free- "men of the city of *Norwich*, and for six calendar months last "past have been *an inhabitant* within the ward of ( ), men- "tioning the ward." &c. By *s.* 4. To prevent disputes which may arise touching the votes of persons in the hospitals or work-houses, or of prisoners for debt in the prisons of the said city, it is enacted that none such shall be admitted to poll at any such elections; "save only at such elections as shall happen for that "ward in which he shall have inhabited 6 calendar months im- "mediately preceding his being placed in such hospital or "workhouse, or immediately preceding his imprisonment for "debt in such common gaol or other prisons." &c. And a form of oath is given in corresponding terms; and by *s.* 6. a poll-clerk is to be admitted into these places to take the votes of such as are there confined.

Wilson and *Storks* now shewed cause against the rule; and observing that the defendant must be ousted if 3 out of the 4 votes objected to were bad, they confined their objection principally to

[516] the three last-mentioned voters, considering *Jessop* as more favourably situated than the rest, by reason of his having resided in the ward with his family within six months preceding the election for other purposes than merely that of voting; which was the only object for which the rest came: but none of them having

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having had a continual residence there for such antecedent period as is required by the act, though they had houses and families there. These men were all substitutes and not ballotted militiamen, and therefore they were under no compulsion of law to be absent, but such as was of their own chusing when they entered voluntarily as substitutes, and therefore their situation is not at all different from that of ordinary soldiers. The actual place of their inhabitancy during the period in question was at *Colchester*, where the regiment lay, and therefore could not be said to be at *Norwich*, either within the plain words or the reasonable construction of the *Norwich* act. The privilege of voting in the place is given in return for the burthens which actual inhabitancy throws upon the citizens, and for the performance of which *personal* residence is necessary; such as keeping watch and ward, and executing corporate duties. *Inhabitancy* does not differ in its legal and ordinary sense from *residence* or *dwelling*, when applied to the performance of personal duties; though for the purpose of subjecting the owners of property to charges laid on them in respect thereof, it has been taken in a larger sense; as in the case of the statute of bridges, commented upon by Lord *Coke* (*a*); which statute plainly points at persons holding property in the county, &c., though residing in another place: and also in the [517] case of the riot act (*b*). No middle line can be drawn in this case; for if these substitutes had a right to vote as being *inhabitants* within the ward *for six calendar months before the election*, merely because they held houses there during that period, though personally resident and compelled to reside elsewhere during the greater part of the time, and their residence there being only casual, and by leave, for the special purpose of voting; it will follow that every common soldier, though quartered in another place, may be deemed an inhabitant of *Norwich* under the like circumstances. Admitting that a daily residence is not necessary to make a man an inhabitant of a place, according to *Sargent*'s case (*c*), if the party have a bonâ fide domicile there, and do not take it colourably; and supposing that some latitude is allowable even where inhabitancy for a precise period is in question; still it cannot, without destroying the qualification altogether, be extended further than to allow of casual and short temporary absences during the required period, and not to cases of this description where the party is necessarily absent during the

(*a*) 2 *Inst.* 702, 3, on the stat. 22 *H.* 8. *c.* 5.

(*b*) *Atkins* v. *Davis*, *Cald.* 315.

(*c*) 5 *Term Rep.* 466.

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greater part of the time, and his going to reside at all in the place must depend wholly upon the will of another. They also reasoned upon the particular provision in the local act of the 3 *Geo.* 2. respecting freemen residing in gaols or hospitals; which they said was unnecessary upon the construction contended for by the defendant, as those persons if they had families domiciled within the city would still have been entitled to vote. [But the Court considered that the object of this provision was altogether distinct, and was meant to preclude any claim of voting for the
[518] wards in which such hospitals and prisons were by reason of their inhabiting the same.]

Lord ELLENBOROUGH C. J. The act in question requires and ought to receive a reasonable construction, according to the subject matter of it and the manifest object of the legislature. The act meant to secure the right of voting for corporate offices to the freemen bonâ fide inhabitants of the city for a certain period before the election, and is therefore satisfied by a bonâ fide inhabitancy. Now of what other place but of *Norwich* could these men be said to be inhabitants at the time? They had their own dwelling-houses or homes there, in which they left their families dwelling, and to which they returned from time to time when they obtained leave of absence from their regiment. They had no other abiding place than this; for the place where the regiment happened to be quartered could not be considered as such: and though they could not perform watch and ward at *Norwich*, yet they were liable there to all public burthens in respect of their houses there in which their families dwelt. They were therefore to be considered as bonâ fide inhabitants of the city, subject to have their inhabitancy there interrupted by the calls of the public service: and as all who are ballotted cannot serve in person, I think their absence on duty would be as much protected upon the ground of the exigency of the public service as if they had been themselves ballotted men.

GROSE J. These men were *inhabitants* of *Norwich* within the fair and honest sense of the word, and the reasonable con-
[519] struction of the local act. They had their dwelling-houses there, for which they paid rent, and in which their families were inhabiting while they were upon duty. If they were not inhabitants there, of what other place could they be fairly said to be inhabitants?

LE BLANC J. I think that these persons were inhabitants of *Norwich* during the period in question within the true meaning of the act of parliament: and I cannot consider that their habitation

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tion was at *Colchester*, whether they were in fact living there in barracks or in quarters. And if the regiment had been in barracks, or quartered in a different ward from that in which the men had their houses and families, and the question had been whether they were to be considered as inhabitants of the one ward or the other, I should have said that they were inhabitants of the ward in which their houses were. It seems to me that the provision respecting freemen in gaols or hospitals was introduced in order to regulate in what ward such persons were to be considered as inhabitants. They were still to be considered as inhabiting within the city; but they were to vote for that ward where they were inhabiting for six months before they went into the gaol or hospital: but this is confined to persons in gaols or hospitals within the city. Now these men are much more to be considered as inhabitants, who being soldiers must necessarily be absent from their proper homes with their regiment; but who during all the time had houses of their own in the place in which their families dwelt, and to which they themselves resorted when absent from the regiment on furloughs.

BAYLEY J. These men were honestly by the medium of their families inhabitants of *Norwich* at the time. It was an honest and not an occasional residence there within the fair meaning of the law. [520]

Rule absolute for entering a verdict for the Defendant.

DOE, on the Demise of WM. ASKEW and Another, *against* AGNES ASKEW.

Saturday, Feb. 4th.

THIS ejectment was brought by devisees in remainder after the customary estate of the last tenant's widow, to recover a customary estate held of the manor of *New Hatton* in *Westmoreland*, in the possession of the defendant, who was the widow of *Roger Askew*, the customary tenant last seised, and who held the same, as was alleged, by the custom of the manor, *during her*

Entries on the rolls of a manor court of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held *during her chaste viduity*, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced.

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chaste viduity; on the ground of her having forfeited her estate by incontinency during her widowhood. The fact of her having had a child long after her husband's death and before the demise laid being proved, the steward of the manor, of which Lord *Lonsdale* was the lord, gave evidence of the custom that the widow of a customary tenant dying seised, on paying a heriot, holds during her *chaste viduity*, and loses her estate if she marry or have a child. That if a man die leaving a widow, and devise his estate to another, the devisee is not admitted till her death or the sooner determination of her estate. And that when an heir or devisee is admitted on the determination of a widow's estate, it is usual in the admission to take notice of the widow's estate, and how she
[521] loses it, whether by marriage or otherwise; as thus: the party prays to be admitted; *such an one, widow, who held the same during her chaste viduity, according to the custom of the manor,* being now married, or being now dead, &c. That he had known many instances of such admissions. The same witness however proved, that *he had known no instances in fact where a widow had lost her estate by incontinency during her widowhood;* and that the simple term *viduity* was used as often as *chaste viduity* in the admissions. Another witness who had been acquainted with the manor for 50 years (which was long before the time spoken to by the steward of his own knowledge) also deposed to the custom being for the widow to hold during her *chaste viduity;* though he knew no instance in fact of the forfeiture of a widow's estate for unchastity. But in 1753 (being an attorney) he was proceeding to get an affidavit of a widow having had a child, in order to get an admission; but she dying, it became unnecessary. On this evidence it was objected at the trial, by the defendant's counsel, that as there was no instance in fact proved of a widow's losing her estate by unchastity, that part of the custom as to *chaste* viduity was not proved. But *Wood* B., before whom the cause was tried, being of opinion that the entries on the rolls of admissions noticing and recognizing the custom, and the parol evidence above stated, were sufficient to prove it; a verdict was taken for the plaintiff; and a recommendation was given by the learned judge to the defendant's counsel to take the advice of this Court upon his direction.

Topping accordingly obtained a rule in last *Michaelmas* term, which he was now called upon to support, for setting aside the
[522] verdict and granting a new trial, on the ground that the custom for the widow to forfeit her estate for unchastity was only proveable by evidence of instances in fact of such a forfeiture having been

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been enforced. He urged shortly the danger of establishing a cause of forfeiture by custom merely from the form of some of the entries of admissions of third persons made by the lord's steward, unsupported by any evidence of its having been acted upon and contradicted by other entries on the rolls.

Cockell Serjt. was stopped by the Court.

Lord ELLENBOROUGH C. J. There was certainly evidence of the custom relied on to go to the jury, though no instance were known of a widow having in fact forfeited her estate for this cause. It might have happened that from fear of the forfeiture, or from the sense of moral obligation, no such instances of forfeiture had occurred. The custom would then come to be decided by evidence of the form of admissions only. Those that were made durante castâ viduitate, if uncontradicted, would be evidence that such was the condition on which the estates in the manor were originally granted out: and these are not necessarily contradicted by the entries of admissions durante viduitate generally; for they might be understood of a viduity according to the custom, which the other entries would shew to be a chaste viduity. There is therefore no necessary contradiction between them: and the jury have decided the question.

Per Curiam, Rule discharged.

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DOE, on the Demise of MORTON, *against* ROE.

Monday, Feb. 6th.

A plea of ancient demesne permitted to be filed de bene esse within the four days, pending a rule nisi for permission to allow the plea so filed.

READER applied, on *Thursday* the 26th of *January*, for a rule in this ejectment, calling on the plaintiff to shew cause why the defendant should not have leave to plead that the lands specified in the declaration are holden in ancient demesne, and why the plea to that effect on that day filed should not be allowed. This was founded upon an affidavit by the tenant in possession that the premises in question were holden of Sir *William Dolben* Bart., as of his manor of *Thingdon*, in *Northamptonshire*, which manor is holden in ancient demesne; and that there is a court of ancient demesne held within the manor, and suitors thereof, in which court and before which suitors the lessor of the plaintiff might have proceeded in ejectment: and that to the best of his belief the lessor of the plaintiff is seized in fee of the premises in the declaration mentioned. This application was made in consequence

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sequence of the rule recognized in *Doe d. Rust* v *Roe* (*a*), that such a plea can only be pleaded with leave of the Court upon a proper affidavit. But a difficulty occurred, that this being a plea in abatement must be pleaded within four days; and that time would have expired before cause could be shewn and the plea pleaded: wherefore the Court, after consideration, gave leave to the defendant to file his plea within the time de bene esse, and directed the rule to be drawn up in the form abovementioned.

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Bramston now shewed cause against the rule; and after admitting that the defendant's affidavit was made in conformity to the requisitions of the former case, relied principally upon an affidavit made in answer to the rule, stating that a considerable part of the premises in question were copyhold and parcel of the manor of *Thingdon* aforesaid; and that the steward of the manor could find no instance of any proceedings taken in the manor court for recovering possession of lands held in ancient demesne of the manor. And he observed that copyholds were not held of the manor, but of the lord, according to the custom of the manor, and for these the remedy was different, as appears by *Fitz. Na. Brev.* 23. 25. And in *Brittle* v. *Dade* (*b*), it was held that the jurisdiction of the lord's court in ancient demesne extends only to lands holden of the manor, and not to copyhold, which is parcel of the manor.

Lord Ellenborough C. J. You may reply that matter if the plea of ancient demesne be not good with respect to copyhold: but we cannot divide the merits of the plea on affidavit. Here there is a sufficient affidavit that the lands for which the ejectment is brought are ancient demesne, to require us to admit the plea.

Rule absolute.

(*a*) 2 *Burr.* 1016. (*b*) *Salk.* 185.

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CAMMACK *against* GREGORY.

Monday, Feb. 6th.

TO debt on bond, conditioned for the payment of money, the defendant pleaded severally, non est factum, usury, and a set-off; and all the issues being found for the plaintiff at the trial, he took his verdict with 1*s.* damages and 40*s.* costs. And now application was made by *Garrow* and *Wild*, on the stat. 43 *Geo.* 3. *c.* 46. *s.* 3., for costs to be allowed to the defendant, on the ground that he had been held to bail for 65*l.*, when by the plaintiff's own admission at the trial no more than 50*l.* was due. But

Debt on bond where the plaintiff recovers a verdict for nominal damages only, and takes his judgment for the penalty, is not within the relief of the stat. 43 *G.* 3. *c.* 46. *s.* 3. enabling the Court to allow the defendant costs if the plaintiff do not *recover* the amount of the sum for which he had held the defendant to bail.

The Court, without entering into the merits, were of opinion that the verdict being merely for nominal damages, and the judgment being for the penalty of the bond, (within which special bail had been taken) the case was not within the act; which only gives the Court jurisdiction to award costs for the defendant after verdict for the plaintiff, in cases where the plaintiff shall not *recover*, (which means recover by verdict of a jury) according to the real estimate of the damages, the amount of the sum for which he had held the defendant to special bail, without reasonable or probable cause. And therefore they refused the application.

Park and *Lawes* for the plaintiff.

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LIDDARD *against* LOPES and Another.

Tuesday, Feb. 7th.

THE plaintiff brought indebitatus assumpsit for the freight of goods, and also for the use and hire of a ship used by the defendants with a cargo belonging to them; with counts also for demurrage, and for work and labour: and at the trial before Lord *Ellenborough* C. J. in *London*, a verdict was taken for

Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship to freight to the defendants on a voyage from *Shields* to *Lisbon*, with convoy; *the freight to be paid on right delivery of the cargo;* the ship having sailed from *Shields* with her cargo and joined convoy at *Portsmouth*, and after being detained near a month off *Lymington*, her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants having refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendants, and then was sold by consent of both parties without prejudice: held that the plaintiff could not recover freight pro ratâ or demurrage.

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the plaintiff for 1000*l.* subject, as to the amount, to the award of an arbitrator, if the Court should be of opinion that the plaintiff was entitled to recover upon the following case:

The plaintiff was owner of the ship *Mayflower:* the defendants were merchants in *London:* and on the 24th of *August* 1807 an agreement in writing, in the nature of a charter-party, was entered into between them, whereby it was "mutually agreed between *W. Liddard*, owner of the ship the *Mayflower*, then lying at *Hull*, and Messrs. *Lopes* and *Collins* of *London*, merchants, that the said ship being tight, &c. should, with all convenient speed, proceed to *Shields*, and there load from the factors of the freighters a full and complete cargo of coals in bulk, and proceed therewith to *Lisbon* with the first convoy, and deliver the same on being paid freight, at the rate of 45*l.* per keel, together with 6*l.* per cent. primage, in lieu of port charges and pilotage, (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage, always excepted;) *the freight to be paid on right delivery of the cargo.* Fifteen running days are to be allowed the said merchants (if the ship is not sooner dispatched) for unload-
[527] ing the ship at *Lisbon*, and the customary time to load at *Shields;* and ten days on demurrage over and above the said laying days at 5*l.* per day. Penalty for non-performance of this agreement 500*l.*" Soon after this agreement was made the ship took in a cargo of ten keels of coals belonging to the defendants at *Shields*, and sailed thence on the 3d of *September* 1807, and arrived at *Portsmouth* on the 15th in order to join convoy. On the 20th, the captain having received sailing instructions, sailed with the convoy from *Portsmouth*, and came to an anchor off *Lymington*, where the convoy was detained by contrary winds until the 15th of *October;* and on the 17th the sailing instructions were recalled, and the next day the ship returned to *Spithead.* The ports of *Portugal* were in the beginning of *November* shut against *British* ships by the *Portuguese* government, and continued shut until the *French* took possession of *Portugal* on the 30th of *November;* and from that time until and after the bringing of this action, *Portugal* has been occupied by the king's enemies, and the existing Government of the country has been at war with *Great Britain.* On the 26th of *December* the plaintiff gave the following notice to the defendants: "I beg leave to confirm my notice to you of the 19th *Nov.*; and I hereby give you further notice to get out the *Mayflower*'s cargo of coals at *Portsmouth*; and unless necessary proceedings are taken to that effect on or before the 31st instant,

I shall

I shall give orders to land and warehouse the same at your risk and expence. The average account shall be made out without further delay, and I shall wait on you for your proportion thereof. I also herewith inform you that I reserve to myself the right of proceeding against you at law for freight, demurrage," &c. On the 1st of of *January* 1808 the defendants sent the following answer to the plaintiff: "If you land the coals by the *Mayflower* you will take the consequences. We do not consent, if we are to be called upon for freight and expences." The cargo remained on board the vessel at *Portsmouth* until the 12th of *February* 1808, when it was landed by order of the plaintiff, after a previous notice given to the defendants. In *March* last, by consent of both parties, but without prejudice on either side, the coals were sold, and produced, after deducting the invoice price and all expences of unloading, landing, and warehousing, a neat profit of 166*l.* 18s. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover a compensation for the part of the voyage which he had performed, and for the detention of his ship at *Portsmouth?* If he were not entitled to recover for either of these demands, a verdict was to be entered for the defendants.

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Taddy, for the plaintiff, proposed two points for argument: first, whether the owner of the ship were entitled to freight pro ratâ, under the circumstances, for the part performance of the voyage from *Shields* to *Portsmouth*: and secondly, whether he were entitled to recover for demurrage during the stay of the ship at *Portsmouth*. 1st, On principles of natural justice the plaintiff is entitled to recover something; for he has loaded a cargo, and incurred expence and risk for the defendants. The objection, if any, can only arise upon the express contract in the charter-party excluding the implication of a promise founded upon natural justice: and that would be so, if the charter-party had provided for the case which has happened: but an unforeseen emergency has arisen, quite beside the case which was provided for by the charter-party, beyond the control, and without the default of either party; which has prevented the execution of the contract by making it illegal to carry the goods to a port occupied by the enemy. This made an end of the contract, and did not merely suspend its execution like a temporary embargo in our own ports until the further order of council (*a*). This then

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(*a*) *Hadley* v. *Clarke*, 8 *Term Rep.* 259.

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brings the case within the principle of *Luke* v. *Lyde* (*a*), where an implied promise was raised on the ground of the labour performed for the benefit of the defendant in carrying his goods part of the voyage contracted for, in conformity with the rule of the marine law which allows of freight pro ratâ. And this was not overruled by *Cook* v. *Jennings* (*b*); for that was an action of covenant upon the charter-party itself, and therefore the plaintiff was not entitled to recover any freight by the terms of the contract, without shewing complete performance of the voyage contracted for. And in *Mulloy* v. *Backer* (*c*) the Court seemed inclined to support the principle of *Luke* v. *Lyde*.

Lord ELLENBOROUGH C. J. That was upon the ground of there having been an acceptance of the cargo by the owner in the course of the voyage, which shewed his election to receive his goods at that place, instead of having them sent on to the place of their original destination: but the acceptance of the goods was the very substance of the new implied contract in *Luke* v. *Lyde*. But here there has been no agreement to accept the goods; but they were landed and sold without prejudice to either party. The case of *Luke* v. *Lyde* has been often pressed beyond its fair bearing; but the true sense of it has been ex-
[530] plained by my brother *Lawrence* in *Cook* v. *Jennings*, and my brother *Le Blanc* in *Mulloy* v. *Backer*. Then what does this case amount to? The parties have entered into a special contract, by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract; and that event has not taken place; there has been no such delivery; and consequently the plaintiff is not entitled to recover: he should have provided in his contract for the emergency which has arisen.

Per Curiam,

Postea to the Defendant.

Storks for the defendants.

(*a*) 2 *Burr.* 882. (*b*) 7 *Term Rep.* 381.
(*c*) 5 *East*, 316.

ATKINSON *against* RITCHIE.

Thursday, Feb. 9th.

THE plaintiff declared specially in assumpsit against the defendant for breach of an agreement, in not loading a *complete* cargo of hemp, under the same circumstances before set forth in the case of *Ritchie* v. *Atkinson (a)*; with counts for money paid and on an account stated: to which the defendant pleaded the general issue. And at the trial before Lord *Ellenborough* C. J. at *Guildhall*,* a verdict was taken for the plaintiff for 2000*l.* damages, subject to an award as to their amount, and to the opinion of the Court upon a special case, stating all the circumstances set forth in the former report.

This case was argued in the last time by *Taddy* for the plaintiff, and by *Littledale* for the defendant. I was not present when it was argued; but I collected afterwards the substance of the argument to be this.

For the plaintiff, the freighter, it was contended, that the contract not having been performed by the defendant, the master of the ship, it lay upon him to shew either a discharge by the plaintiff from performance of it, or a competent excuse for non-performance. A contract is to be enforced according to its terms, where no general principle of law intervenes to prohibit the execution of it. The vis major et casus fortuitus of the civil law are not recognized by our law as excuses: the party may protect himself against these by express stipulation. For which *Paradine* v. *Jane*, *All* 27., and *The Company of the Brecknock and Abergavenny Canal Navigation* v. *Pritchard*, 6 *Term Rep.* 750. were cited. There is no instance of an express contract qualified on the grounds of inevitable necessity or accident intervening to prevent the performance of it, if it be not illegal; as in the

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(a) *Ante*, 295. As the plaintiff in that case was the defendant here, and vice versâ, in reading the facts there stated, the descriptions of *plaintiff* and *defendant*, as there applied, must here be reversed. And the present case concluded with stating (as before in p. 298.) that "The *Adelphi* arrived in *London* and delivered her cargo there to the plaintiff; (the then defendant.) The remaining facts stated in the former case not being material to raise the question now made.

The master and the freighter of a vessel of 400 tons having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to *St. Petersburgh*, and there load from the freighter's factor a *complete* cargo of hemp, and iron, and proceed therewith to *London*, and deliver the same, on being paid freight, &c. held that the master, after taking in at *St. P.* about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on *British* ships by the *Russian* Government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted bonâ fide, and under a reasonable and well-grounded apprehension at the time; and a hostile embargo and seizure was in fact laid on six weeks afterwards.

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instance put in 1 *Ld. Ray.* 321. If the defendant meant to protect himself against the acts of the king's enemies, he should have so provided in his contract. And though the exception as to "*restraint of princes and rulers*" has been considered to be introduced into these contracts for the benefit of the master, according to *Blight* v. *Page*, before Lord *Kenyon*, cited in 3 *Bos. & Pull.* 295. and *Touteng* v. *Hubbard*, ib. 298.; yet according to the general rule of law in 10 *Rep.* 106. *b.* 3 *Com. Dig.* 334. *Faits, E.* 8. and *Plowd.* 171. that every exception is to be construed strictly against the person for whose benefit it is introduced, the case in question is not within the exception: for this was no actual restraint; only an apprehension of it, an approximation to it: the restraint was not actually imposed on *British* ships till six weeks afterwards.

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For the defendant, it was admitted that the terms of exception in the contract were not to be extended; but it was insisted that other necessary exceptions might be implied; and that it is a paramount duty imposed by law on the master to act for the benefit and safety of the ship, the crew, and the cargo, and still more to the state to which he belongs. He may throw the cargo overboard in case of distress; though that be only from the reasonable *apprehension* of danger. *Molloy* 255. Upon a question between the owner of goods on board and the master, if the latter had remained after advice and reasonable warning of an expected embargo, which had afterwards taken place, by which the owners lost their goods, would not an action have lain against him? The master of the ship is agent for the freighter as well as for the owner. He has one duty, to take on board the cargo; and another paramount duty to do the best he can for all concerned, and to preserve his ship and crew for the state as well as for the individuals concerned, to prevent them from falling into the hands of an enemy: and this was evidently a hostile embargo. In *Touteng* v. *Hubbard*, 3 *Bos. & Pull.* 301. Lord *Alvanly* lays down the principle, "that where the policy of the state intervenes, and prevents the performance of the contract, the party will be excused." It might under some circumstances be criminal in a master not to take reasonable warning to avoid an enemy. A party covenanting to build a house by a particular day was held to be excused from performance at the day, by reason that the plague was in the place; because he was not bound to risk his life for it. 1. *Roll. Abr.* 450. *pl.* 10. So here the jury have found that the master acted as he did under a reasonable and well-grounded apprehension of a hostile seizure.

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In reply; the argument derived from the marine law of *Jettison* was answered by stating, that it only applied to actual impending danger, and not to a distant apprehension of it. That though the captain might be deemed a general agent for the shipper; yet not so, where another agent was pointed out.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. The question between the parties in this case arises upon an agreement in the nature of a charter-party. The parties are the merchant freighter on the one hand, and the master on the other: each contracting for himself with the other, as principals. Under such circumstances any constructive agency on the part of the defendant, in his character of master, for the plaintiff, as the freighter of goods, is wholly out of the question. Their relative claims upon, and duties in respect of, each other are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance. The rule laid down in the case of *Paradine* v. *Jane, Alleyn* 27., has been often recognized in courts of law, as a sound one; i. e. that "when "the party by his own contract creates a duty or charge upon "himself, he is bound to make it good, if he may; notwith- [534] "standing any accident by inevitable necessity; because he "might have provided against it by his contract." And this has been recognized in several cases, as in *Buller* v. *Dommitt*, 6 *Term Rep.* 650 and *The Company of Proprietors of the Brecknock and Abergavenny Canal Navigation* v. *Pritchard and Others*, 6 *Term Rep.* 750. It has been contended that the exception contained in this contract, of "restraint of princes and rulers during the voyage," excuses the not taking on board a complete cargo in this case. But, without considering whether this provision respecting *restraint of princes*, &c. be at all applicable by way of excuse for the non-performance of this part of the master's stipulated duty, viz. the taking on board a complete cargo; yet, at any rate, the *restraint* meant must be an actual and operative restraint, and not a merely expected and contingent one, as this at most only was. But, it has been further argued by the defendant's counsel, that supposing the master, in respect of his express contract, not to be otherwise justifiable in regard to the freighter; yet, that he is so, at any rate, on the ground of his paramount duty to the state; which required him to save the property and crew under his charge from impending

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ing peril of an instantly expected embargo: and, that, in every private contract, however express in its terms, there is always reservation to be implied for the performance of a public duty, in which the interest of the state is materially involved. That no contract can properly be carried into effect, which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law; are propositions which admit of no doubt. Neither can it be questioned, that, if from a [535] change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a *British* subject owes to his sovereign and the state of which he is a member; the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject. But in order to found this new public duty, which is to supercede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place; and that the danger to result to the public interests of his own country from an observance of the contract should be clear, immediate, and certain. In short, such a state of circumstances must be shown to exist, as that the contract is no longer capable of being performed by him without a criminal compromise of his public duty. Can any thing of this kind be said, with truth, to exist in the present case? No actual change in the political relations of *Great Britain* and *Russia* had then taken place. The danger to result from remaining at *Cronstadt* was neither immediate or certain: in point of fact it attached only at the distance of many weeks afterwards. And no one can venture to suggest even in argument, that the loading in question might not have been completed without any criminal compromise of public duty. Indeed to allow a man to withdraw himself from the performance of a distinct positive contract, upon the ground of some speculative inconvenience suggested as *likely* to result from such performance to the general interests of the state, would afford great encouragement to disin- [536] genuous subtleties and refinements upon subjects of this kind, and would render all reliance upon the solemn stipulations of parties in commercial matters precarious and insecure; and which encouragement this Court would most reluctantly lend its assistance to administer. For the reasons already given, such an argument has

has no foundation to rest upon in the present case. Therefore, neither upon this ground, any more than upon the others already considered, is the plaintiff precluded from a right to recover. The consequence is, that the verdict for the plaintiff must stand, and the postea be delivered to the plaintiff.

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CONWAY and DAVIDSON *against* GRAY.

Friday, Nov. 18th.

A foreigner insuring in this country his ship or goods on a voyage is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government and makes such embargo his own voluntary act. And goods having been consigned by such foreigner on his own account and risk to *British* merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance on his account; debiting him with the premiums; and the goods were afterwards abandoned in consequence of such embargo: held that as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear; however they might have insured their separate interests by a policy made on their own account.

THIS was an action against an underwriter on a policy of insurance, dated 25th of *January* 1808, effected in the names of the plaintiffs, on wheat and peas, as interest might appear, on board the ship *Swift*, at and from *New York* to *Liverpool*. The declaration stated that whilst the vessel was at *New York* with the goods on board, and before her departure from thence to *Liverpool*, she was and still is restrained by the government of the United States of *America* from proceeding on her voyage, and is still detained at *New York;* by means of which restraint the cargo on board is wholly lost. The first count charged the interest in the cargo to be in the plaintiffs jointly; the second, in the plaintiff *Davidson* alone; the third, in one *J. Townsend*. The defendant* pleaded the general issue; and at the trial at *Lancaster*, a verdict was found for the plaintiffs, subject to the opinion of the Court on these facts.

The plaintiffs, *Conway* and *Davidson*, are *British* subjects, carrying on business as merchants in *Liverpool*, where *Conway* resides; but *Davidson* has for some time past resided in *America*. The *Swift* belonged to a subject of the United States of *America*. In *November* and *December* 1807, *Townsend*, a resident citizen of the U. S. of *America*, and the person in whom the interest is averred in the third count, shipped a quantity of wheat and peas on board the *Swift* and two other vessels, and consigned the same to the plaintiffs, *Conway* and *Davidson*, at *Liverpool:* and the following bill of lading and invoice were made out, and duplicates thereof sent to the plaintiffs, and received by them. Bill of lading—"Shipped in good order, &c. by *J. Townsend*, a native

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citizin of the United States, in and upon the good ship the *Swift*, whereof is master, &c. —— *Price*, now lying in the port of *New York*, and bound for *Liverpool*, to say, 4920 bushels of wheat, &c. being to be delivered in the like good order, at the aforesaid port of *Liverpool*, (the dangers of the seas only excepted), unto Mess. *Conway* and *Davidson*, merchants there, or to their assigns, he or they paying freight for the said wheat, &c. at 1*s.* 8*d.* per bushel, &c. In witness," &c. (Dated at *New York*, 23d of *December* 1807, and signed by *I. Smith*, the purser). "*Invoice* of wheat and peas shipped by *J. Townsend*, a native citizen of the United States, on board the ship *Swift*, Capt. *Price*, bound for *Liverpool*, and consigned to Mess. *Conway* and *Davidson*, merchants there, for sales and returns on account and risk of the shipper." The particulars of the shipment are then specified, and the invoice signed at *New York* 23d *December* 1807, by *J. Townsend*. Before the shipment of the wheat and peas the plaintiff *Davidson* had agreed to grant *Townsend* an anticipation of 6000*l.* on account of the cargo, by bills on the plaintiffs *Conway* and *Davidson:* and accordingly, on the 7th of *November* 1807, *Townsend* drew on *Conway* and *Davidson* on account of the cargo three bills of exchange for 1000*l.* each three months date, and three other bills of exchange for 1000*l.* each at four months' date; which bills were accepted by *Conway* and *Davidson*, and when at maturity were duly paid in *England* by them. Part of the wheat and peas by one of the other vessels arrived in *England*, and was sold by *Conway* and *Davidson*, and the proceeds received by them: but on the whole transaction of the wheat and peas *Townsend* is still indebted to the plaintiff in 2122*l.* 18*s.* 3*d.*, which is more than the sum insured. The wheat and peas in question were of greater value than the sum insured. *Townsend* is also indebted to the plaintiffs on the balance of their general account. The defendant subscribed the policy in question on the 25th of *January* 1808. The premiums of insurance on the wheat and peas were charged by the plaintiffs to the account of *Townsend*. On the 22d of *December* 1807 an act was passed by the U. S. of *America* for laying an embargo on all vessels in the ports and harbours of the U. S.; whereby the embargo was laid on all vessels in the ports and places within the jurisdiction of the U. S., cleared or not cleared, bound to any foreign port; and which directed that no clearance should be furnished to any vessel bound to any such foreign port, except vessels under the immediate direction of the President: with a proviso that nothing therein contained should prevent the departure of any foreign vessel,

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vessel, either * in ballast or with goods on board, when notified of that act. By virtue of this embargo the vessel which was at *New York* in the U. S. of *America* with the cargo on board, was, on the 25th *December* 1807, when the embargo was first known there, detained and prevented from proceeding to *Liverpool*, and still continues so detained. The plaintiffs, when they heard of the detention, abandoned the vessel to the underwriters. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover upon any of the counts? in which case the verdict was to be entered for the plaintiffs accordingly: otherwise a nonsuit was to be entered.

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CONWAY and DAVIDSON *against* FORBES.

THIS was a similar action on another policy of insurance on cotton on board the same ship, laying the interest in the two first counts the same as in the other action, and in the third count in *A. Macomb.* The facts stated were in substance the same as in the former case. *Macomb*, by whom and on whose account and risk the cottons were shipped and consigned from *America* to the plaintiffs at *Liverpool*, being a resident *American* citizen, had agreed, in *December* 1807, with the plaintiff *Davidson*, who was then in *America*, to make such consignment; and *Davidson* agreed to grant him an anticipation of 7500*l.* by bills on the plaintiff's house at *Liverpool* on account of the cotton, and which was the first transaction in trade between these parties. Six bills were accordingly drawn by *Davidson* himself on *Conway* and *Davidson*, to this amount in the whole, on the 22d of *December* 1807, at 5, 6, and 7 months, and the cotton was shipped and consigned to the plaintiffs at *Liverpool*, accompanied with a bill of lading and invoice; but the plaintiff's house afterwards refused to accept the two first sets of bills at 5 and 6 months, which were noted and returned to *America;* but when the two bills at 7 months, for 1000*l.* and 1500*l.* became due, they paid them to the holder, and their amount is still unpaid to the plaintiffs. This case also stated a letter from *Davidson* to *Conway*, dated *New York*, 23d of *December* 1807, the day after the act of the *American* legislature passed, stating the shipment of the cotton from *Macomb*, and the writer's expectation that the *Swift* would sail the next day; which letter was shown to the underwriters at the time the policy was effected. This case further stated, in addition to the other, that information of the embargo arrived at *Li-*

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verpool on the 26th of *January* 1808; but at that time the plaintiff *Conway* had received no information of the cotton being actually shipped at *New York;* nor did he know of its being so shipped until the 11th of *February,* when he received such information in a letter from *Davidson,* directing him also to abandon to the underwriters; which he accordingly did on that day.

MAURY *against* SHEDDEN.

THIS was another case depending upon the question of the *American* embargo, arising out of an action against an underwriter on a policy of insurance, stated in the first count to be dated the 22d of *January* 1808, on the ship *Georgia,* at and from *Savannah* in *Georgia* to *Liverpool,* valued at 6000*l.* and declared and understood to be registered in the name of the plaintiff, consul of the United States of *America* residing at *Liverpool,* who was the sole owner, and to be made against all risk whatsoever, *British* capture excepted, including any and every irregularity or want of papers, in case of capture or detention by any power whatever, *British* excepted.

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This case stated that the plaintiff was born in *America,* and resided there till the year 1786, when he came to reside at *Liverpool* as a merchant. In 1790 he was appointed, and has since continued, consul of the United States of *America* at *Liverpool.* By the navigation laws of *America* a privilege is allowed to its consuls residing in foreign countries to hold *American* ships or parts of such ships, notwithstanding their residence out of the U. S., a privilege not granted to any other description of its subjects, unless to a citizen of the U. S. residing abroad and having a partner and house of trade in the U. S. who is also a citizen. The plaintiff has had no house of trade in *America* since he left that country in 1786. He was sole owner of the ship *Georgia,* insured, which was an *American* vessel, and registered as stated in the policies. The case then stated, as before, the embargo act of the 22d of *December* 1807, and that the plaintiff, when he heard of the detention, abandoned the vessel to the underwriters. It also stated a letter of the 7th of *January* 1808, received on the 10th of *February* by the plaintiff from his correspondent in *America,* stating that he had just received intelligence of the embargo, and that if it were confirmed it would be best to bring the *Georgia* up to *Savannah Town,* and let her lie in safety. The *Georgia* was accordingly hauled up the river to the town by the plaintiff's agents.

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These cases were all argued in *Michaelmas* term last by *Littledale* for the plaintiffs, and by *Scarlett* for the defendants.* And it was contended that the underwriters were liable for the detention of the ship and goods under the embargo of the *American* government, though the respective owners of the property were *American* subjects; there being, as it was said, nothing against the laws or policy of this state in a foriegner insuring here against the acts of his own government; whatever question there might be as to the legality of an insurance by a subject of this country against loss by an embargo laid on by our own government; the legality of which however was maintained, as it made no difference to the state on which of its subjects the loss fell. But supposing the Court to be of opinion that a foreigner could not claim to be indemnified against the acts of his own government; it was then contended for the plaintiffs in the two first actions, that as consignees of the goods, and having paid a consideration for them up to the extent of the bills drawn upon and paid by them, they had a sufficient interest to entitle them to recover on those policies: and further, that *Davidson* had a sufficient interest to maintain the action as drawer of the bills in the second case which had been refused acceptance and had been returned protested to *America*, he being liable as drawer to pay the same. These were the principal points made in argument; bnt it is unnecessary to detail the arguments, as the substance of them was stated by the Court in giving judgment. The cases referred to on the first point were *Rotch* v. *Edie*, 6 *Term Rep.* 413. *Kellner* v. *Le Mesurier*, (explained in *Lubbock* v. *Potts*, 7 *East*, 451.) 4 *East*, 396. *Touteng* v. *Hubbard*, 3 *Bos. & Pull.* 291. and *Hadley* v. *Clarke*, 8 *Term Rep.* 259. On the second point, *Caldwell* v. *Ball*, 1 *Term Rep.* 205. *Hibbert* v. *Carter*, ib. 745. *Hill* v. *Secretan*, 1 *Bos. & Pull.* 315. *Wolffe* v. *Horncastle*, ib. 316. *Lucena* v. *Craufurd*, 3 *Bos. & Pull.* 103. and *Thompson* v. *Taylor*, 6 *Term Rep.* 478.; and vide *Barker* v. *Blakes*, 9 *East*, 283.

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Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court in these several cases.

These were cases in each of which the plaintiffs claimed a right to abandon, in consequence of the *American* embargo in *December* 1807; and the main question in each was the same. The first was upon a policy on goods on board the *Swift*, at and from *New York* to *Liverpool*; and the interest was averred in one count to be in the plaintiffs jointly; in another, in one of them

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only, i. e. *Thomas Davidson*; and in a third, in *John Townsend*. *Townsend* was a resident citizen of *America*, and had consigned the goods to the plaintiffs for sale, on his (*Townsend*'s) account and risk. The plaintiffs, *Conway* and *Davidson*, are *British* subjects, carrying on business as merchants in partnership at *Liverpool*; *Conway* residing at *Liverpool*, and *Davidson* having for some time past resided in *America*. The invoice and bill of lading are dated the 23d of *December* 1807. Before the shipment *Davidson* had agreed to grant *Townsend* an anticipation of 6000*l*., on account of these and certain other goods, by bills on the plaintiffs: and accordingly, on the 7th of *November* 1807, bills to that amount were drawn by *Townsend* on the plaintiffs, and these bills were accepted by *Davidson*, the partner of *Conway*, in *America*, within a day or two after their date, and were paid when due by the plaintiffs. The plaintiffs have been reimbursed part of the
[544] amount of these bills; but 2122*l*. 18*s*. 3*d*. is still due to them upon that transaction. This policy was subscribed on the 25th of *January* 1808; and the plaintiffs *charged the premiums to* Townsend's *account*. On the 22d of *December* 1807 an act was passed by the *American* government for laying an embargo on all ships and vessels in their ports. By this embargo this vessel was detained; and as soon as they heard of the detention the plaintiffs abandoned. It is stated indeed in the case of *Conway* v. *Gray*, that the plaintiffs abandoned *the vessel;* and nothing is said as to the *goods;* and as the insurance was on the *goods*, an abandonment of the *vessel* could give no claim; but we presume that this is a mistake, and that the goods were abandoned.

In the second cause (*Conway and Another* v. *Forbes*) the facts are merely similar. The policy was upon goods in the same ship; those goods were shipped by *Alexander Macomb*, a resident *American* citizen; they were consigned to the plaintiffs *on Macomb's account and risk*. *Davidson* agreed to grant *Macomb* an anticipation of 7500*l*. by bills on the plaintiffs, drawn by *Davidson* in *America;* and the plaintiffs have paid 2500*l*. upon those bills. The bills of lading and invoice are dated at *New York* the 24th of *December* 1807, and the policy is dated the 25th of *January* 1808. The plaintiffs *charged the premium to Macomb*.

In *Maury* v. *Shedden* the policy was upon ship valued at 6000*l*; and the plaintiff, the *American* consul, who was then resident at *Liverpool*, was the sole owner. Mr. *Maury* is a native of *America*, but came to reside at *Liverpool* as a merchant in 1786; and from the year 1790 has been the *American* consul
[545] there. The ship is an *American* vessel, and registered there under

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under a privilege allowed by the navigation laws of *America* to their consuls.

Upon each of these cases this question arises: 1st, Whether the *American* embargo will warrant an abandonment by or on behalf of an *American* subject; and if not, then a second question arises in the first and second causes; Whether *Conway* and *Davidson*, as consignees of the goods, being in advance to the consignors and under acceptance for them, have a right to apply the policies to their own interests, as such, and to abandon on that account. As to the first; in all questions arising between the subjects of different states, each is a party to the public authoritative acts of its own government; and, on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject in a *British* court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. This seems to be established by *Touteng* v. *Hubbard*, 3 *Bos. & Pull.* 291. That was an action by the owners of a *Swedish* vessel against a *British* subject, for not supplying the vessel with a cargo at *St. Michael's*. The sailing of the ship from this kingdom had been prevented a considerable time, and until it was too late for the fruit season at *St. Michael's*, by an embargo here upon *Swedish* vessels. That embargo was in the nature of reprisals for what were considered acts of aggression by the *Swedish* government. The Court was of opinion, that if that had not been the case of a *Swede* against a *British* subject, the plaintiff would have been entitled to recover: but as the embargo was produced by acts of the *Swedish* government, and every *Swede* was to be considered a party to those acts, it was in effect the plaintiff's own fault that [546] his vessel was detained; and then the loss which resulted from it was one he ought himself to bear. He was bound to proceed with all convenient speed; the acts of his government led to his being prevented; he was considered as a party to those acts; and was therefore looked upon as having failed in his part of the contract, viz. to sail with all convenient speed. In the cases now before the Court, the foundation of the abandonment is an act of the *American* government: every *American* subject is to be considered as a party to that act; it has, virtually, the concurrence and consent of all, and, amongst the rest, the concurrence and consent of the assureds in these cases: the assureds therefore have joined in a resolution, that the ships in question shall not be allowed to sail, but shall remain in their ports: and is it possible for

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for them afterwards to make their not sailing the foundation of an action? The party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done. Where the insured and insurer are both subjects of the same state, the case will stand upon very different grounds of consideration.

As to the second question; Whether the consignees have not a right to apply the policies to their own interests, and to abandon on that account; we are of opinion that they have not. It might perhaps be difficult to make out that they had such an interest as was capable of abandonment; because they were to have no control over the goods but upon their arrival in *England*.

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And it may also be very questionable whether any policy, which is effected clearly to cover the interest of the consignor, can be applied to protect the interest of the consignee. But the particular ground of our decision is this, that were a policy is effected on behalf of the consignor, and the conduct of the consignor, or of the state to which he belongs, has taken away from him the right of enforcing it directly and effectually for his own benefit, the consignee is not at liberty to apply it to *his* interest, and enforce payment as though it had been made on *his* account. We do not say a consignee may not insure; we only say that he is so far identified in interest and right with his consignor, as not to be able to apply with effect to his own interest, which is derived out of that of the consignor, an insurance which was effected in order to cover the interest of the consignor; but, which, upon the principle already stated, cannot be available for that purpose. The underwriter has an implied pledge from the assured, that he will do no act to obstruct the voyage; and when that pledge is broken by the person on whose account the insurance was made, can another person, who has paid no premium out of his own pocket, step in to take the benefit of that insurance, merely because his dealings with the assured would have enabled him to have insured in his own name; There is no case which decides that he can, and it would be gross injustice that he should. *Wolffe* v. *Horncastle*, 1 *Bos. & Pull.* 316., which was cited in the argument, goes no such length. In that case the plaintiffs had effected a policy to cover the interest of one *Lund* in a cargo, and had advanced 300*l.* on the credit of that cargo; the main question was, Whether the policy were so effected as to cover *Lund*'s interest: and if it were not, then it was con-

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tended that it might be applied to cover that interest which the plaintiffs

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plaintiffs had acquired by their advance of the 300*l*. The Court were unanimous that the policy was so affected as to cover *Lund*'s interest; so that a decision upon the other point was unnecessary; but they intimated a clear opinion upon that point, that the plaintiffs had an insurable interest: and they seem to have thought the policy might have been applied to it, if it could not have been applied to *Lund*'s. How does that case, however, bear upon this? *Lund* had done no act to forfeit his right upon the policy; and if he could not have recovered, it would have been merely because the policy was not effected so as to be capable of covering his interest; the only objection made to *Lund*'s interest being, that *Wolfe* had made the insurance without orders or authority from *Lund:* and then if it could not apply to the 300*l*. the plaintiffs had advanced, it would have been applicable to nothing. Here the policies were effected, so as to be capable of covering the consignor's interest, and for the express purpose of doing so: they are applicable to *that*; and the consignors have forfeited their rights by the act of their Government. The case of *Wolfe* v. *Horncastle*, therefore, concludes nothing in favour of these plaintiffs. In truth in that case had the plaintiffs been allowed to recover upon their own interest, on account of the advance they had made, it would in substance have been suffering *Lund* to recover pro tanto; because then they could not have resorted to him for reimbursement: and in these cases, if *Conway* and *Davidson* were allowed to recover in respect of their advances, it would in substance be suffering the *American* consignors to recover pro tanto, because it would wipe off the claim which *Conway* and *Davidson* have upon them. [549] In *Wolfe* v. *Horncastle* it would have been in furtherance of justice, because *Lund* had done nothing to forfeit his claim upon the policy: in this case it would be against justice, because these *American* consignors have done that by which their claim is precluded. For these reasons we are of opinion, that in each of these cases the postea must be delivered to the defendant.

DOE,

Thursday, Feb. 9th.

DOE, on the Demise of HARDWICKE *against* HARDWICKE.

Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock, including as to six of the estates, 3 several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to make 3 in like manner as aftermentioned, for other persons to do the same;" and then giving this general power "that *when and so often* as the lives or either of the estates before given shall be *by death reduced to two*, that then it shall be in the power of the person or persons then enjoying the said estate or estates to *renew* the same with the person or persons to whom the revenue thereof shall belong by *adding a third life* in such estate, and paying such reversioner two years purchase for such renewal; and also to *exchange* either of the said two lives on payment of one year's purchase:" Held that this power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life.

THIS case was argued in *Michaelmas* term last by *Abbott* for the plaintiff, and *Jervis* for the defendant. The argument turned wholly on the intention of the testator to be collected from the particular provisions of a very perplexed will. And after consideration,

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an ejectment for premises at *Tytherington* in the county of *Gloucester;* and both parties claimed under the will of Dr. *Peter Hardwicke*, the lessor of the plaintiff under a residuary clause in the will; and the defendant under a lease, which he insists was warranted by a power which the will contains; and the case depends upon the validity of that lease. Dr. *Hardwicke* by his will devised part of his estates (not now in question) to trustees, in *trust to sell and pay debts and legacies; and subject thereto, he devised part of it to his nephew *James Hardwicke* for life; with remainder to his first and other sons in strict settlement: with several remainders over. The testator then devises seven different estates, the last of which is the estate in question. The first he devised to his nephew *Samuel* for life; remainder to *Samuel*'s wife for life; remainder to all and every his children for their respective lives. The next he devised to his nephew *James* for life; remainder to *James*'s sister *Elizabeth* for life: and power is given to them "to add or declare another life or "lives to make three, in like manner as after mentioned for other "persons to do the same." The third estate he gives to trustees during the lives of his brother *Joseph* and his four children, in trust to pay a moiety of the rents to *Joseph* for life, and the other to his children, and upon *Joseph*'s death to pay the whole to the children. The fourth estate he gives to his nephew *George* for life; remainder to *George*'s wife for life; remainder to all and every the children of *George* for their lives. The fifth estate

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he gives to his niece *Rachael* (wife of *Daniel Ludlow*) for life; remainder to her son for life. The sixth estate he gives to his brother *Benjamin* for life; remainder to *Benjamin*'s wife for life; remainder to all and every of his children for their respective lives. And the seventh estate he gives to his sister *Rachael Shellard* for life; remainder to her husband for life; remainder to their children *Edward, Thomas,* and *Mary* for their respective lives. He then gave power to Mrs. *Shellard,* his brother *Benjamin,* and his nephews *Samuel* and *George,* to direct which of their children should have priority of enjoyment. After which follows the power upon which the case arises, which is in these words: "And my will further is, that *when and as often as the lives on any or either of my estates before given* to my said sister, brothers, and nephews, *shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the said estate or estates to renew the same* with the person or persons to whom the revenue thereof shall belong and appertain, *by adding a third life in such estate,* and paying such reversioner after the rate of two years' purchase for such renewal; *and also to exchange either of the said two lives,* on payment of one years' purchase for such exchange." The testator then limits the residue of his estate to his nephew *James* and his first and other sons in strict settlement; remainder to his nephew *Samuel* and his first and other sons in strict settlement; remainder to his brother *Joseph* for life; remainder to *Joseph*'s first and second sons, *John* and *Peter,* successively, and their first and other sons in strict settlement; remainder to *Joseph*'s other sons in tail male; with divers remainders over. And he assigns as a reason for preferring his nephew *James* to his nephew *Samuel,* that *James's* father had had great trouble in purchasing for him part of the estate devised. By a codicil the testator provides, "that no wife of any of his brothers or nephews should have power to add or exchange any second husband as a third life." These seem to the material parts of the will and codicil.

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On the 1st of *December* 1766 the lives upon the 7th estate (that given to the *Shellards*) were reduced to two; and *George Hardwicke* being the person then enjoying that estate, he procured the addition of a third life. The additional life soon afterwards died; and on the 21st of *December* 1770, *George Hardwicke,* being still the person enjoying the estate, procured the addition of another life. Each of these lives were put in by *Joseph Hardwicke* who was become entitled to the reversion for life. *Joseph Hardwicke* is since dead, and the lives are reduced to

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to the last additional one he put in; so that unless the lease by which he put in that life is warranted by the power, the lessor of the plaintiff is entitled to recover. For the plaintiff it is contended, that the power warrants only one renewal, and one exchange of a life, in respect of each estate: for the defendant, that it warrants repeated renewals, and repeated exchanges of a life, from time to time, whenever the number of lives on each estate is reduced to two. It is observable that the estates for life given by this will are not estates pur auter vie, but *estates for life given to several persons successively;* and the exchange of a life, or the addition of a life, to be made when the lives on the estate so given shall be reduced to two, must be in the same manner; that is, the life of a person to enjoy the estate for his or her respective life, not of a life to be put in, during the continuance of which any other person to whom a life estate is limited, or his or her assigns, shall enjoy the estate: so that there seems no reason why the testator should give a perpetual right of such nomination to persons who must be strangers to him. The right of once naming a new life, and of exchanging an old life for a new one, might be with a view of enabling a brother or nephew to provide for a second wife, or to provide for a wife which any of the sons of his brother, sister, or nephew, might happen to marry: and the clause in the testator's codicil seems to favour such a construction; by which he declares, that no wife of any of his brothers or nephews should have power to add or exchange any second husband as a third life. This shews the testator's anxiety to exclude any stranger from the enjoyment of his estate; and also shews his intention that the life to be added should be that of a person by whom the estate was to be enjoyed by him or her personally, during life: for if his intention had been to enable the person enjoying his estate to renew, by taking a lease to himself and his assigns during the life of a nominee; there could be no good reason why that nominee, or cestui que vie, should not be a second husband of a brother's or nephew's wife. Another argument for confining the power of renewal to one time only arises from the language used by the testator in the clause giving that power to his nephew *James*, and *James*'s sister *Elizabeth*, in respect of the estate given to them. The testator has devised an estate to his nephew *James* for life; remainder to *James*'s sister *Elizabeth* for life; with a power to *them* to add or declare another life or lives to make three, in like manner as after mentioned for other persons to do the same. These latter words assimilate the power given in this instance to the power given in the devises of the

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the other estates; with this only difference, that inasmuch as in the devisees of the other estates, the limitation being to more persons than two for successive life estates, the power of renewal is given only when those life estates shall be reduced to two: but this estate being given originally to two only, to take successive life estates, the power of nominating a third life is given to them immediately; but it is only given personally to them, and can only by the very terms of the power be exercised once: and no reason can be assigned why the power, professedly given to be exercised in *like manner*, should be exercised in a different manner. The argument in favor of a perpetual right of renewal, which pressed most strongly, was drawn from the words, *when and as often;* which it was said could not be satisfied but by a perpetual right of renewal, whenever the number of lives on each estate so given should be reduced to two. It appears however to us that those words do not require such extensive construction; and that the words, *as often*, more properly relate to the several occasions of the lives on the several estates being reduced to two; inasmuch as there being more estates than one where the lives will be reduced to two, that event will happen more than once; respect being had to the several different estates. The defendant therefore claiming to hold in virtue of a second added life; all the original lives and one added life being spent; we are of opinion that the addition of such second life was not warranted by the power, and that the plaintiff is entitled to recover.

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Postea to the Plaintiff.

HAVELOCK

Thursday, Feb. 9th.

HAVELOCK *against* GEDDES and Others.

1. A covenant in a charter-party of affreightment that the owner shall at his expence *forthwith* make the ship tight and strong, &c. for a voyage for 12 months, &c. and kept her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages.

THIS was covenant upon a charter-party of affreightment, dated the 5th of *September* 1806, whereby the plaintiff, owner of the ship *Lord Duncan*, of 933 tons burthen, of which *A. Heartley* was master, let her to freight to the defendants for 12 calendar months certain from the 24th of *September* 1806, and from thence for such longer period, if any, as the defendants should think fit to keep and retain the same, upon the conditions and covenants therein after contained. And the plaintiff covenanted that the ship should be navigated and furnished with 50 persons, and such further number, not exceeding 100, as should be required by the defendants; the owner being reimbursed by the freighters for such additional number according to the average rate of wages and provisions expended on the whole. That the ship, during the time she should be navigated and employed under the charter-party, should be under the entire control of the defendants, *so far as related to all orders for sailing, destination, and delay. And the defendants covenanted to pay to the owner for the hire and service of the ship for the said term of 12 calendar months, and such longer period as they should keep the same, the freight and rate following, viz. 24*s.* per calendar month per ton, being 1119*l.* 12*s.* per month, commencing from the

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But if the owner's neglect to repair in the first instance had precluded the freighter from making *any* use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action.

2. A ship having been let to freight for 12 months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c. it is no answer to a breach for non-payment of six months' freight due at the end of the 10 months, that the owner had covenanted to *keep* the vessel *in repair* during the time she was freighted, and that she was not in repair *when* the freighter *shipped goods* on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months; and that he had paid the freight for all the time she was serviceable; and that she was not in his service for 10 months in the whole: for non constat but that after she had been used by the freighter, she wanted repair without any default of the owner, or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair.

3. The freight being reserved at so much *per month*, was earned at the end of each month, although the stipulated times of payment were from 4 months to 4 months, and the ship were lost before the end of 14 months.

4. An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid *till the ship's discharge, or return from her voyage*, and the ship having sailed on a voyage to *St. Domingo*, where she arrived, but was burnt before her return; held that such loss was a *discharge* of her from the freighter's employment, as if by the act or the freighter; on which such extra allowance became payable.

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24th of *September* 1806, *and ending when the ship should be returned to the river* Thames, *and there by the freighters declared to be discharged:* it being understood that the freighters should not be at liberty to discharge the ship abroad, although she might be abroad at the expiration of the said 12 calendar months, or at any other place, but within the port of *London*. And that the freight should be paid in the proportions and at the periods following, viz. 2 months freight at the execution of the charter-party either in cash or by accepted bills of the freighters at 3 months from the said 24th of *September;* 2 months more at the end of 6 calendar months from the said 24th of *September*; 2 months more at the end of 10 calendar months; 2 months more at the end of 14 calendar months, should the ship be so long employed; and in like manner 2 months more at the end of every succeeding 2 calendar months, *until the ship should be discharged*; *and immediately upon such discharge,* the balance to be paid by the freighters in cash or their acceptance at 3 months. That the freighters should pay all port charges, tonnage duties, dock dues, and all other duties and dues, except lights and pilotage, which were to be paid by the owner. That they would reimburse to the owner the charges for additional men beyond 50 as before mentioned; two calendar months allowance for such additional men to be added to the first payment of freight; *but the residue of such allowance to be paid until the ship's discharge, or return fom her first intended voyage:* and *in like manner for any other foreign voyage or voyages.* By virtue of which charter-party the defendants on the said 24th of *September* took the ship into their service and kept and retained the same therein until she was afterwards, and whilst she was so in their service, and after the expiration of 10, but before the expiration of 12 months from the same 24th of *September*, viz. on the 22d of *August* 1807, at *St. Domingo*, without any default of the owner, master, or mariners, *consumed by fire and wholly lost,* and was thereby prevented from returning to *London*. And then the plaintiff, after averring that the ship, during all the time she was so kept and detained in the service of the defendants, was navigated and furnished with 50 persons, and such further number, not exceeding 100, as was required by the defendants; and was during all that time under the entire control of the defendants as to all orders for sailing, destination, and delay; assigned three breaches; 1. that though the defendants paid the plaintiff the two months freight payable at the execution of the charter-party, and also the 2 months' freight at the end of the first 6 calendar months; yet

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yet they did not pay the two months freight at the end of the said 10 calendar months. 2. That the defendants have not paid to the plaintiff any subsequent freight. 3. That although on the 24th of *October* 1806 the defendants required the plaintiff to put on board, and he did not put on board, 20 additional men beyond the 50, who all sailed in the ship on a foreign voyage to *St. Domingo*, and continued on board from thence until the loss of the ship: and although according to the average rate of wages and provisions expended on the whole, the defendants became
[558] liable to pay to the plaintiff 8*l.* per month for every such additional man: yet the defendants had not reimbursed the plaintiff for any of them.

The defendants craved oyer of the charter-party, by which it appeared further that the plaintiff covenanted that the ship, at his expence, should be *forthwith made tight and strong*, and well and sufficiently equipped, manned, and fitted, &c. *for a voyage or voyages* of 12 calendar months to foreign parts; and should *during the continuance of the charty-party be kept* tight and strong, and well and sufficiently equipped, &c. and victualled; concluding with a mutual general covenant for performance: and particularly the plaintiff binding to the defendants the said ship, freight, tackle, &c. (the perils and dangers of the seas, rivers, &c. all inevitable accidents whatever, and capture by enemies, and the detention and restraint of rulers, &c. being excepted:) and the defendants binding to the plaintiff the goods put on board the ship. The defendants then pleaded, 1. non est factum. 2dly, That the ship was not at the expence of the plaintiff *forthwith* or within a reasonable time after the charter-party made tight and strong, and well and sufficiently equipped, &c. for a voyage or voyages of 12 calendar months to foreign parts; whereby she was delayed and hindered from proceeding on a voyage from *London* to *St. Domingo*, and was detained on her said voyage at *Portsmouth* for an unreasonable length of time, viz. for 4 months, during all which time the defendants lost the use and benefit of the ship, and were put to great expence in repairing her and making her tight and strong and fitting her for such voyage; and also that thereby certain goods of the defendants on board the ship were wetted and damaged; wherefore they pray judgment of the plaintiff's action. 3dly, The defendants
[559] pleaded as to the first breach, that during the 12 calendar month's therein mentioned, viz. on the 1st of *November* 1806 certain goods of the defendants were shipped on board the vessel to be carried from *London* to *St. Domingo*; and that *at the time of shipping* them

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them the vessel was not tight and strong, and well and sufficiently equipped, &c. but was decayed, leaky, defectively provided, and in an unseaworthy state for performing the said voyage; in consequence whereof it became necessary to unload and repair her, and she was afterwards unloaded and repaired before she could proceed on and perform her said voyage: and by means of the premises the ship was *unemployed by and wholly unserviceable to the defendants for a great part of the six calendar months* from the 24th of *September* 1806, viz. for 4 calendar months part thereof. And then the defendants averred that they paid to the plaintiff for the hire and service of the ship for the residue of the said 6 calendar months the freight in the charter-party mentioned. The fourth plea was the same in substance as the last; omitting only to state that the defendants paid for all the time the ship was not wholly unserviceable to them or unemployed: and it avers that the ship *was not in the* ACTUAL *service and employ of the defendants, or retained in such service under the charter-party for* 10 *calendar months in the whole from the* 24th *of* September 1806 *until she was consumed* by fire as in the declaration mentioned, and which fire happened without any default in the defendants. 7thly, The defendants pleaded (to the second breach) that the ship after the charter-party made *was not employed by them or in their service until the end of* 14 *calendar months* from the said 24th of *September* 1806; but while she continued in their service and employ, and before the end of 14 calendar months, &c. viz. on the 22d of *August* 1807, in parts beyond the seas, near *St. Domingo*, the ship, without any default of the defendants, was consumed by fire and wholly lost. 8thly, (as to the last breach), That the defendants did reimburse to the plaintiff two calendar months allowance for the additional men beyond 50 put on board, &c.; and further, that after making the charter-party the ship sailed on a voyage from *London* towards *St. Domingo being her first intended voyage outwards* under the charter-party with a cargo of goods of the defendants' on board: and that afterwards, on the 22d of *August* 1807, *in parts beyond the seas* near *St. Domingo, the ship was*, without default of the defendants, *burnt and wholly lost, and never did return from* St. Domingo *aforesaid.*

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The plaintiff in his replication demurred to the 2d, 3d, and 4th pleas, and assigned for special causes of demurrer, that the defendants in each of those pleas had attempted to put in issue immaterial facts, and had insisted on divers covenants of the plaintiff as conditions precedent to the performance of their own covenant;

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covenant; whereas they were separate and independent covenants; and the breaches of covenants alleged against the plaintiff in these pleas were no answer to or justification of the breaches of covenant of which the plaintiff complains. To the 7th plea the plaintiff replied, that the defendants after making the charter-party, viz. on the 18th of *November* 1806, dispatched the ship with a cargo on a voyage to the island of *St. Domingo;* and that the ship afterwards, and after the expiration of 7 calendar months from the said 24th of *September* 1806, and before she was so burnt and wholly lost, viz. on the 4th of *May* 1807 arrived at *St. Domingo,* and delivered her cargo, and completed the said voyage. As to so much of 8th plea as relates to the two
[561] calendar months allowance for the additional men, the plaintiff took issue on the reimbursement of such allowance. And as to the residue of the plea he replied, that before the ship was consumed by fire, to wit, on the 20th of *August* 1807, the ship had arrived at *St. Domingo* and completed the said intended voyage.

The defendants joined in demurrer on the 2d, 3d, and 4th pleas; and demurred generally to the replications to the 7th and the latter part of the 8th pleas: on which there was also joinder in demurrer.

This case was argued on a former day in the term by *Gaselee* for the plaintiff, and *Marryat* for the defendants. The questions made upon the demurrer to the 2d, 3d, and 4th pleas were, whether the agreement in the charter-party that the ship should be made tight and strong, &c. were a condition precedent to the payment of any freight; and whether the matters alleged in those pleas were an answer to the action on the breach of covenant for non-payment of the freight; or were the ground of a cross action against the plaintiff for damages. The next question arose upon the demurrer to the replication to the 7th plea, whether the ship not having returned from her voyage to *St. Domingo* back to the river *Thames,* and been there discharged, but having been burnt abroad before the end of 14 calendar months from the date of the charter-party, after she had completed her outward voyage to *St. Domingo* (which was completed after the end of 7 calendar months;) the owner were entitled to any part of the freight accruing after the expiration of six calendar months; which is what he claimed upon the second breach of covenant. The last question arose upon the demurrer to the replication to the latter part of the 8th plea; whether the ship having been so burnt at
[562] *St. Domingo,* and not discharged in the river *Thames* or returned from her first intended voyage; the plaintiff were entitled to any

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part of the extra allowance claimed by the last breach of covenant beyond the part payment made in the first instance. The substance of the arguments on these points were afterwards fully stated by the Court in giving judgment. And after time taken to consider,

Lord ELLENBOROUGH C. J. now delivered judgment, (after stating the declaration as before set forth.)

The defendant craved oyer of the charter-party, by which it appeared that the plaintiff covenanted that the ship, at his expence, should *forthwith* be made tight, staunch, and strong, and well and sufficiently equipped, manned, &c. for a voyage or voyages of 12 calendar months, and should, during the continuance of the charter-party, be kept tight, staunch, &c. and well and sufficiently equipped, manned, &c.: and it is upon this covenant that the defendants have grounded several of their pleas. The first plea, upon which any question arises, states that the ship was not forthwith, after making the charter-party, made tight, staunch, &c. and well and sufficiently equipped for a voyage or voyages of 12 calendar months; per quod she was hindered from proceeding on a certain voyage from *London* to *St. Domingo*, and detained an unreasonable length of time; during all which time the defendants were deprived of the use of the ship, and were put to great expence in making her tight, staunch, &c. and fitting her for her voyage, and divers goods of the defendants which were put on board her were wetted and damaged. To this plea, which is pleaded to the whole of the demand, the plaintiff has demurred, and the question upon it is, [563] Whether the defendants are entitled to insist that the *forthwith* making the ship tight, staunch, &c. was a condition precedent. The defendants did not repudiate the ship, because she was not immediately made tight, staunch, &c.; but took her into their service and employed her; and, after having navigated her for several months, they say that, because this was a condition precedent, and was not performed, they are not liable to pay any thing. They do not pretend that the non-performance has damnified them to the extent of the payment they wish to evade: and to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c. would be a breach of the condition, and a defence to the whole of the plaintiff's demand. We are clear, however, that the defendants, who took the ship into their service and employed her in an unimpaired state, have no right to insist that the *forthwith making her tight*, &c. was a

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condition precedent. Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained, as is laid down in *Porter* v. *Shephard*, 6 *Term Rep.* 668. and in *Glazebrook* v. *Woodrow*, 8 *Term Rep.* 370, 371. And it would be an outrage to common sense to say, that it could have been the intention of these parties, that if the defendants took to this ship, as a ship in their employ under the charter-party, they should be at liberty afterwards to insist that the making her complete in every particular, and that forthwith, without any delay, was a strict condition precedent on the part of the plaintiff. The cases cited are also decisive upon the point.

[564] *Constable* v. *Cloberie*, *Palm.* 397. shews that a covenant to sail with the first wind is not a condition precedent. *Bornman* v. *Tooke*, *Campb.* 377. proceeds upon the same principle. *Boone* v. *Eyre*, 1 *H. Blac.* 273. in the notes, lays down a very sensible general rule, that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other: but where they go only to a part, and a breach may be paid for in damages; there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. Had the plaintiff's neglect here precluded the defendants from making *any* use of the vessel, it would have gone to the *whole* consideration, and might have been insisted upon as an entire bar; because the consideration for the defendants to pay the freight would then have failed in toto; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a *part* only; the consideration has not *wholly* failed; and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right, under a counter-action, to such damages as they can prove they have sustained from this neglect. For these reasons we are of opinion that this plea cannot be supported, and that the demurrer to it must be allowed.

The next plea submitted to the consideration of the Court is pleaded to the first breach only. It states that during the 12 months mentioned in the charter-party, divers goods were shipped on board the vessel, to be carried from *London* to *St. Domingo;* that at the time of shipping them the vessel was not tight, staunch, &c. and sufficiently equipped, &c., but on the contrary was decayed, leaky, ill-fitted, and in an unseaworthy state; that

[565] in consequence thereof it became necessary to unload and repair the

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the ship; that by means of the premises the ship became unemployed by and unserviceable to the defendants for a great part of six calendar months; and that the defendants have paid for the hire and service of the ship for the residue of the said six calendar months. There is another plea similar to this, except that it does not state that the defendants paid for all the time the ship was not unserviceable to them, or unemployed: and it avers that the ship was not in their service or employ for 10 calendar months in the whole, To these pleas the plaintiff has also demurred, and the question upon them is, whether the defendants have shewn such a neglect in the plaintiff, as will excuse them from the payment of the freight which the first breach claims. These pleas are founded, not upon the stipulation *forthwith to make* the vessel tight, staunch, &c., but upon the stipulation to *keep* it so; and it is not alleged that there was any defect at the commencement of the 12 months for which the vessel was hired; but that *at the time of shipping the goods* during the 12 months she was not tight, &c. It is therefore perfectly consistent with the allegations in these pleas, that the ship had been put into a perfect state, and thoroughly equipped, immediately after the execution of the charter-party; that she was so when the defendants took her into their service; but that she became otherwise (which might be from one of the accidents to which all vessels are subject) whilst in the defendants' employ. It is indeed consistent with these pleas, that the vessel might have performed a voyage for the defendants before this defect occurred: and as it is a general rule that pleas are to be taken most strongly against the party pleading them, inasmuch as it is probable he would state his case as favourably for himself as the facts would permit, we [566] should be warranted in assuming this to be the case. The pleas do not state that there was any delay in making the repairs, or through any default in the plaintiff that the defect had occurred. The question then is, whether, because the plaintiff has undertaken to keep the vessel tight, &c., the defendants have a right to deduct any thing out of the freight they are to pay, in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired? And we are of opinion that they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation we think the true con-

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struction of the charter-party is, that whilst those repairs are going on, the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments. As these pleas therefore do not shew that it was owing to any default in the plaintiff that the defect in the ship occurred, or that there was any delay in repairing it; we are of opinion that no deduction is to be made from the freight on that account; that these pleas therefore are bad, and that the demurrer to them must be allowed.

The next plea, upon which a question arises, is pleaded to the second breach (which claims freight beyond the expiration of six calendar months); and this plea is, that the vessel was not in the service or employ of the defendants until the end of 14 calendar
[567] months, but within that time was, without any default in the defendants, consumed by fire. To this the plaintiff has replied, that the vessel sailed for *St. Domingo*, delivered a cargo there after the end of seven calendar months, and was not burnt till afterwards. To this replication there is a demurrer; and the defendants contend that the stipulations in the charter-party, which fix the times for paying the freight, make the right to the portions of freight payable at those times depend upon the *then* safety of the ship; and that the loss of the vessel before any one of those periods destroys the right, except for such freight as was previously payable. That a loss, for instance, after the end of six months, but before end of 10, would have precluded the plaintiff from claiming more in the whole than four months freight: and that a loss after 10 months, and within 14, would have confined the plaintiff to six months freight. It is to be remembered, however, that the charter-party stipulates that the defendants should pay a given freight *per calendar month;* and the times fixed for its actual payment can only be considered as postponing, for the defendants' convenience, the actual payment of a sum then due to a future period; not as creating a contingency whether it should ever be paid at all. Each month's freight therefore was earned, and became completely due, at the end of each month; and it was nothing but the actual payment that was postponed. We are therefore of opinion that this plea is also bad, and that the demurrer to the plaintiff's replication must be over-ruled.

The last question arises upon the last breach, which is for the allowance of the extra men: of that allowance two months was to be added to the first payment for freight, and the residue was not
[568] to be paid till the *ship's discharge or return* from her first intended voyage, and in like manner for any other foreign voyage or voyages. The defendants' plea to this breach is, as to the first two months

months allowance, payment; and as to the residue that the ship sailed upon a voyage to *St. Domingo*, and was burnt and lost before her return. The plaintiff has taken issue upon the payment; and as to the residue has replied, that the ship arrived at *St. Domingo*, and completed that voyage. To this there is a demurrer; and the defendants insist that as the ship *never was discharged*, and *never returned*, nothing beyond the first two months allowance became payable. But we are of opinion that the destruction and loss of the vessel was, within the true intent and meaning of this charter-party, a discharge of the vessel from the further prosecution of the adventure and employment in which she was engaged: and that upon that event the residue of extra allowance became payable, as if the discharge had taken place by the act of the defendants themselves: and that the defendants must be understood to have discharged the vessel when they could by no possibility any longer employ her. We are therefore of opinion in favour of the plaintiff upon each of the several points raised by these pleadings.

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Judgment for the Plaintiff.

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The KING *against* ROGERS.

Thursday, Feb. 9th.

THIS was a conviction upon the stat. 42 *Geo.* 3. *c.* 38. *s.* 30. in the penalty of 200*l.* (mitigated to 100*l.*) against a maltster at *Plymouth*, for having, on *the 27th of April* 1807, wetted corn, then and there making into malt, in a certain stage of operation, while the corn was a-floor, after it had been emptied out of the cistern used for steeping it, *before the full end and expiration of* 12 *days* from the time when the corn had been so emptied out of the cistern; contrary to the form of the statute, &c. Nothing turned on the particular form of the conviction; but it appeared from the evidence set out, that the offence must have been committed between the 20th and the 27th of *April* 1807. And the only question was, Whether at that period the

The stat. 42 *G.* 3. forbids corn making into malt to be wetted while it is a-floor before 12 days from the time when it is emptied out of the cistern. The stat. 46 *G.* 3. *s.* 1. repeals that provision generally, and enacts (*s.* 3.) that the corn in that state shall not be wetted till 9 days, &c. after the 1st of *August* 1806. Then *s.* 14. enacts that *this act* shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of *August* 1806, and shall continue in force till the 25th of *March* 1807. Held that incorporating the 14th with the 1st section, this law only operated as a repeal of the former one during the time limited in the 14th section, after which the first resumed its operation during the inverval between the 25th of *March* 1807 and a subsequent act reviving and continuing the 46 *Geo.* 3.

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act of the 42 *Geo.* 3. *c.* 38. *s.* 30. was in force? As to which the case stood thus:

By that statute no malster shall wet any corn making into malt in any stage of operation after the same has been emptied out of the cistern used for steeping such corn until the expiration of 12 days, on pain of forfeiting 200*l.* By st. 46 *Geo.* 3. *c.* 139. *s.* 1., after reciting the expediency of repealing some of the provisions of the 42 *Geo.* 3., it is enacted, that from and after the 1st of *August* 1806, so much of the recited act as describes the offence above-mentioned in the terms of it shall be *repealed*, except in cases where any fine shall have been then incurred. And by
[570] *s.* 3., from and after the 1st of *August* 1806, no maltster shall wet any corn making into malt, in any stage of operation, after the same shall have been emptied out of the cistern, &c. until the expiration of 216 hours (or 9 days), on pain of forfeiting 200*l.* By *s.* 12 and 13*s.* the general remedies for recovering penalties, &c. given by former acts, are reserved. And *s.* 14. enacts, "That this act shall commence and take effect as to all such matters and things therein contained, in respect whereof no special commencement is hereby directed and provided, from and immediately after the 1st of *August* 1806, and shall remain and continue in force until the 25th of *March* 1807." The last-mentioned act was suffered to expire on the said 25th of *March* 1807, and was *revived* by the stat. 47 *Geo.* 3. *st.* 2. *c.* 37. from the passing of the act on the 8th of *August* 1807, and continued until the 25 of *March* 1808; when having again expired, it was on the 14th of *April* 1808, by the act of the 48 *Geo.* 3. *c.* 36. further *continued* till the 24th of *June* 1809. And it was in the interval between the 25th of *March* 1807, when the temporary repealing act of the 46 *Geo.* 3. *c.* 139. expired, and the 8th of *August* 1807, when it was revived, viz. on the 27th of *April* 1807, that the offence in question against the repealed provision of the st. 42 *Geo.* 3. was committed. And the information on which the defendant was convicted was exhibited on the 16th of *July* 1807, and the conviction itself took place on the 11th of *January* 1808, after the 46th of the king had been revived.

Harris moved to quash the conviction, which had been returned into this Court by certiorari, on the ground that the stat. 46 *Geo.* 3. having repealed the provision of the stat. 42 *Geo.* 3. which constituted the offence of which the defendant had been
[571] convicted, and having substituted another provision in its place; though this latter were only temporary; the prior provision did not revive upon the expiration of the temporary one: for which

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he cited *Warren* v. *Windle* (*a*). And if not, it was admitted that it would not be *revived* during this period by a subsequent *continuing* law, which had passed upon the supposition that the first was then an existing law. The rule was laid down in *Warren* v. *Windle*, that the prior law would not revive after the repealing temporary statute was spent, unless the intention of the legislature to that effect were expressed; which he said did not appear in this case. [He was not, however, at first aware of the 14th section of the 46 *Geo.* which is not in the common printed edition of the statutes. But he afterwards argued] That the operation of the 14th clause was merely confined to the substituted provision in the 3d clause; and that if the first clause did not operate as a perpetual repeal it would be nugatory; for the third clause, being affirmative (*b*), was, while it was in force, a temporary virtual repeal of the former statute. And the argument e contrà must assume that the suspension and the repeal of an act are the same thing.

Dampier, contrá, relied upon the 14th sect. of the temporary repealing statute of the 46 *Geo.* 3., as evincing the intention of the legislature not to repeal the 42d of the king absolutely, but only from the 1st of *August* 1806 to the 25th of *March* 1807; which he said made an end of the question. He said, that he did not differ from the principle laid down by the defendant's counsel, but only on the application of it to this case. The object of the temporary repeal was to give time for making the experiment as to the alteration of the period in respect of wetting [572] the malt; and could not have been meant to abolish every check upon fraud against this branch of the revenue. It was a clear rule, that by the repeal of a repealing statute the original statute is revived (*c*): and it must be the same thing if the repealing law itself provide that the repeal shall be only temporary. And he cited the case stated in Sir *T. Ray.* 397. as strongly to the purpose. In 1661 the Assembly of *Jamaica* made a law for raising a revenue by a tax on strong liquors, which was indefinite and perpetual: afterwards they passed another law granting the like revenue, but to continue for two years. The question was, whether this latter was a virtual repeal of the former law? And it was held by Lord C. J. *North* and several of the Judges assembled, upon debate, that it did not repeal the perpetual law, but only suspended its power during those two years; and when the two years expired it was as if no such act had been made.

(*a*) 3 *East*, 205. (*b*) 6 *Bac. Abr.* 372. Statute *D.*
(*c*) 6 *Bac, Abr.* 372. Statute *D.*

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Harris, in reply, relied on the subsequent acts reviving and continuing the st. 46 *Geo.* 3. to shew that the legislature did not mean to permit the original statute to revive after the 25th of *March* 1807; but it was evident that the act of the 46 *Geo.* 3. was twice suffered to expire for a short period by an oversight. And he argued that the inference of such intent was allowable to be drawn from those subsequent statutes, which had passed before the conviction in question. That the case in Sir *T. Ray.* was very distinguishable from the present; for there the second law was merely nugatory, as making the same provision, though for
[573] a less time than the former one, which it did not affect to repeal: but here the second statute declared the repeal of the first in general terms, and substituted something else in the place of it, which at first was meant to be only temporary.

Lord ELLENBOROUGH C. J. It is a question of construction on every act professing to repeal or interfere with the provision of a former law, whether it operate as a total or a partial and temporary repeal. Here the question is, whether the provision of the stat. 42 *Geo.* 3., which was originally perpetual, be entirely repealed by the 46th of the king, or only repealed for a limited time: if the latter, then the conviction, being after the expiration of the repealing law, which was only to continue in force till the 25th of *March* 1807, was proper. The last act recites indeed that certain provisions of the former one should be *repealed;* but this word is not to be taken in an absolute, if it appear upon the whole act to be used in a limited sense. And it does so appear by the 14th section, which specifies that the act shall commence on the 1st of *August* 1806, and shall continue in force until the 25th of *March* 1807. Then bringing forward that clause and incorporating it with the first, it is the same as if the act of the 46 *Geo.* 3. had said in terms that the provision in the 42d of the king should be repealed from the 1st of *August* 1806 until the 25th of *March* 1807; which in effect is to suspend its operation only for a limited time. So understanding the legislature to speak upon this occasion, it is unnecessary to consider the interpretation which has been put on other repealing or suspending laws, under different circumstances; but the case of the *Jamaica* laws is no authority to impeach this interpretation: as the
[574] second act of Assembly imposing a certain duty for two years, which had before been imposed permanently, seems to have been purely nugatory. Then with respect to the subsequent acts which passed after the 46 *Geo.* 3., and which have been relied on, I cannot infer from them what the intention of the legislature

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was in the 46 *Geo.* 3., unless they had spoken such intent clearly; which they have not done.

GROSE J. The question turns on the true construction of the 46 *Geo.* 3. as to the intent of the legislature to repeal wholly, or only for a limited time, the provision in the 42 *Geo.* 3. The 46 *Geo.* 3. was evidently a mere probationary act suspending the provision of another act for a limited time, in order to see what effect the new regulation would have in suppressing frauds against the malt revenue. For this purpose, though it uses at first general words of repeal, it specifies precisely the times when the new act shall commence its operation, and how long it shall continue in force. This therefore is a very plain and clear declaration of the intention of the legislature, that it did not mean wholly to repeal, but only to suspend the operation of the former law for the time limited: and the words of the subsequent acts must speak a contrary intent as plainly and clearly before we could give it effect.

LE BLANC J. The question arises wholly on the construction of the 46 *Geo.* 3., whether it is to operate as a total repeal of the 42 *Geo.* 3. so as that the former provision could not be brought into force again but by a distinct re-enactment; or only for the time limited in the 14th section. Now taking the different clauses of the 46 *Geo.* 3. together, it appears to have been merely an experimental act superseding the former provision during the [575] time limited by the 14th section; and if that were the meaning of the legislature to be collected from the whole act, there is an end of the argument. Then as to the subsequent acts, we must consider it the same as if the question had come to be decided between the 25th of *March* 1807 and the 8th of *August* in that year, when the first subsequent act was passed, within which period the information was laid before the magistrate, on which he was to decide, and on which the conviction was afterwards founded. The magistrate could only have collected the intention of the legislature from the two acts of the 42 and 46 *Geo.* 3.

BAYLEY J. The true construction of the stat. 46 *Geo.* 3. taken altogether is, that the first clause shall operate only as a suspending clause upon the 42d of the king; for the 14th clause says that "*this act* shall commence and take effect" only from the 1st of *August* 1806 until the 25th of March 1807. Then if *this act* mean the whole of the act, there is an end of the question. And I consider it as relating to the whole act, and after the

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the time limited by the act for it to take effect, I consider the question the same as if that act were no longer to be found in the statute book.

Conviction affirmed.

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Saturday, Feb. 11th.

The KING *against* The Inhabitants of STANDON MASSEY (*a*).

A statute fair being held yearly on the day after old *Michaelmas*, except when old *Michaelmas* falls on a *Saturday*; and then the fair being held on the *Monday*; held that a hiring from such *Monday* till old *Michaelmas-day* following is not a yearly hiring under which a settlement can be obtained.

ALICE KNIGHT was removed by an order of justices from *High Ongar* to *Standon Massey*, in *Essex*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

Ongar statute fair is held yearly on the day after old *Michaelmas* day, except when old *Michaelmas* day falls upon a *Saturday*, and then, on the following *Monday*. At *Ongar* fair 1806, held on a *Monday*, which was two days after old *Michaelmas* day in that year, the pauper was hired to serve *W. C.* of *Standon Massey from the fair day till the old* Michaelmas *day following*, at the yearly wages of 4*l.* 10*s.* She entered on her service upon the *Thursday*, and continued therein till the evening of the following old *Michaelmas* day, when she received her full wages. The Sessions found that the service from the time of the hiring to the *Thursday* was dispensed with by the master.

Bosanquet and *Walford*, in support of the order of Sessions, contended that although the pauper was in fact only hired for 364 days, this was a good hiring for a year within the statute. They relied on *The King* v. *Newsted* (*b*), in which a hiring from *Whitsunday* to *Whitsunday* was held sufficient, although the period did not comprehend 365 days: and argued that if a

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hiring from a moveable feast in one year to the same moveable feast in the next year were good, a hiring from an annual fair to fair, as in this case was equally good. The period in the latter case could never be less than 364 days; but from *Whitsunday* to *Whitsunday* might be less than a year by several weeks.

(*a*) I was not present when this case was decided, but was favoured with this report of it from Mr. *Bosanquet*.

(*b*) *Burr. S. C.* 669.

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Pooley and *Knox* contrà were stopped by the Court.

Lord ELLENBOROUGH C. J. There is a clear distinction between this case and that relied upon. There the hiring was from a moveable feast to the same moveable feast in the following year: here it is from two days after old *Michaelmas* day to the old *Michaelmas* day following. The argument that this is a good hiring, because it is a hiring from fair day to fair day, is unsupported by the facts found by the Sessions; the hiring was neither from old *Michaelmas* day to old *Michaelmas* day, nor from fair day to fair day. The cases upon this subject have gone far enough; and it is necessary to look back to the statute, which requires a hiring for a year. If we allow these constructive hirings to go on, we shall soon have it contended that a servant acquires a settlement who is hired by the keeper of a boarding-school from the breaking up at *Christmas* to the breaking up at *Christmas*, although less than a year should in fact be comprised in the period.

The other Judges concurring,

Order of Sessions quashed.

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WINTER *against* MILES, Knt. and Another, late Sheriff of MIDDLESEX.

Monday, Feb. 13th.

THIS was an action against the sheriff for a false return of nulla bona to a writ of fieri facias issued at the plaintiff's suit against the goods of his Royal Highness the Duke of *Sussex*, residing at the time in *Kensington* palace: and the only question was, whether *Kensington* palace were under the circumstances entitled to the privilege and protection of a royal palace, so as to justify the sheriff in refusing to execute civil process there. The particular circumstances given in evidence were afterwards stated by Lord *Ellenborough* C. J. in giving the judgment of the Court; and the whole case was left by him to the jury at the trial to say, whether *Kensington* were bonâ fide a royal palace; and they found in the affirmative. Upon which the Court was moved in last *Trinity* term to set aside the verdict, and grant a new trial,

Kensington palace being kept in a constant state of preparation to receive the King, with his officers, servants and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of a certain apartments therein.

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on the ground of its being a verdict against law and evidence. And a rule nisi having been granted for the more solemn consideration of the matter, cause was shewn in last *Michaelmas* term by *The Attorney-General*, *Garrow*, and *Comyn*; and the rule was supported by *Williams* Serjt., *Marryat*, and *Barnewall*. The principal authority referred to was *Elderton*'s case, reported in 2 *Ld. Raym.* 978. and also in 3 *Salk.* 91. 284. and 6 *Mod.* 73. and *Holt*, 590. And there were also cited 2 *Inst.* 548. 3 *Inst.* 140—1. 4 *Inst.* 133. Stat. 4 *H.* 7 *c.* 3. 33 *H.* 8. *c.* 12. 1 *Hawk. P. C. ch.* 21. and *Rex* v. *Stubbs*, 3 *Term Rep.* 735.

[579] The Court after the argument directed the case to stand over for consideration: and now

Lord ELLENBOROUGH C. J. delivered judgment.

This was an action against the late sheriff of *Middlesex* for a false return of nulla bona to a writ of fieri facias, delivered to him by the plaintiff for execution against the goods of his Royal Highness the Duke of *Sussex*. The defence made by the sheriff was, that the Duke of *Sussex* had no goods in his bailiwick, except certain articles belonging to his R. H. within *Kensington* palace, where the execution could not, as the sheriff contended, be lawfully executed. And the question was, Whether *Kensington* palace, as it is called, was, under all the circumstances of its present occupation, entitled to the exemptions and privileges which are allowed to belong to a palace in which the king resides? It will be recollected that his late majesty King *George* the Second constantly resided there, as several of his predecessors had done before: that he died there: that his present majesty, upon his accession, held his first council, and performed his first acts of state and government, as king, there. It clearly, therefore, at that period was a royal palace of his present majesty, entitled to every exemption which can be claimed in respect of any palace belonging to his majesty. Being then such a palace, the question is, When did it cease to be so, and become no longer entitled to its former privileges? *Elderton*'s case, in 2 *Ld. Raym.* 918 is the only reported case to be found, which bears any resemblance to the present. The questions which occur in this case were in some degree handled and discussed, but not decided in that case. Three Justices, *Powell*, *Powys*, and *Gould*,

[580] are there stated to have agreed, "that the privilege of the palace "(*Whitehall*) remained, though the queen (the case occurred in "the 2d of Queen *Anne*) were not resident." *Holt* C. J., in Lord *Raymond*'s report of the case, says, "If the court be kept "there, though the queen's person be not present, it is a resi-

"dence:

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" dence: but when the queen, and the whole court, and all the " officers, are removed, has it then the privilege of a palace?" and in another report of the same case, in 3 *Salk.* 234., Lord *Holt* is stated to have held, that where there was a total absence, as in the principal case, " where the queen was neither present " *in person*, nor *by her domestics*, or *any of her family*, the place " was not privileged." And indeed if his majesty were, in the case now before us, neither actually nor virtually present at *Kensington;* neither *in his royal person*, nor *by his officers, domestics*, or *any of his family*, according to Lord *Holt*'s language, it would be difficult to say that such a place was entitled to the privileges of a royal palace; and much more so if the palace were so occupied by others as that his majesty could not immediately return and reside there in his own person, if he were pleased to do so. But it appears by the evidence of Mrs. *Steele*, who lived at *Kensington* palace as a servant to the Duke of *Sussex*, that " there were state-apartments there, and a throne, &c.; that " those apartments were used by nobody else; that they were " reserved for his majesty, and some for his officers; that the " apartments occupied by the Duke of *Sussex* were the apart- " ments of the lord chamberlain; and that his royal highness " (who as a member of his majesty's family came directly within " the terms of Lord *Holt*'s proposition, in the report in *Salkeld*) " used the furniture which was furnished for the lord chamber- " lain; that there are servants, housekeeper, &c. of his majesty [581] " regularly there; and a *guard* in front of the palace; that *the* " *palace was kept up fit for his majesty's reception* if he should " choose to visit it; that there was a deputy housekeeper, Mrs. " *Fisher*, under Mrs. *Strode*, the principal housekeeper; that " divine service was performed in the chapel there every *Sunday*." Another witness proved his having seen his majesty's servants giving directions there. It was not questioned but that the gardeners employed there were paid by his majesty, and that the produce of the gardens were applied to his majesty's use. It was indeed proved that some families resided in parts of the palace: but from the evidence before stated, the palace was, notwithstanding this, " kept fit for his majesty's reception at any " time when he should choose to come there." Under these circumstances it cannot fairly be said, that his majesty was not there present, within the terms used by Lord *Holt, by his* " *domestics*, " *or any of his family:*" nor that the palace was so occupied as to preclude the possibility of his majesty's immediate personal return there at any time. The question of the discontinuance of any

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any place as a palace of residence, which had at any time been so used, by the sovereign upon the throne, might involve in its discussion many extremely delicate circumstances. It would not be a very seemly matter of inquiry, whether his majesty had by any and by what manifestations of his royal will indicated a purpose of not returning to any particular palace. So long, however, as the emblems and ensigns of his kingly dignity are preserved in such palace, and the apartments exclusively appropriated to his use are by his immediate servants kept ready and in a fit condition to receive him at any time; whilst others
[582] are kept in like manner for the use of his officers; and some are immediately occupied by his majesty's sons; and no such use made of the rest of the palace as to preclude or materially interrupt his majesty's return to it whenever he might choose so to do; his majesty we think may be considered as virtually residing there, within the more restrained language of Lord *Holt*, as well as within the larger doctrine of the three other Judges who sat with him, when the only other case in any degree resembling the present came under judicial consideration. On these grounds we think the finding of the jury was warranted under the facts of this case; and that a palace thus in all respects circumstanced may be considered as a place exempt and privileged from the execution and service of the ordinary process of the law, and the defendant of course excused in not having levied within its precincts, the execution in question. Had it indeed distinctly appeared in evidence, that the immediate personal residence of his majesty was, by means of any occupation of the palace incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject before us. And whenever a case so circumstanced shall occur, the Court will not feel itself bound by any thing now laid down from directing a jury, that the exemption in question ought in such a case to be disallowed.

Rule discharged.

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DOE, on the Demise of Sir WILLIAM MILNER, Bart. *against* BRIGHTWEN.

Monday, Feb. 13th.

A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of *England*, according to the custom of the manor; though the only evidence of such custom on the Rolls was three in-

THIS ejectment was brought by the lessor of the plaintiff, claiming as heir at law, to try the title to copyhold lands called *Netherlands*, in the manor of *Tolesbury* in *Essex*, formerly part of the estate of Sir *Thomas Darcy*, who left three daughters, his co-heiresses, *Frances*, *Maria*, and *Elizabeth*. *Frances* in 1692 married Sir *William Dawes*, afterwards Archbishop of *York*, and died in 1705. The archbishop died in 1724. *Maria* married *Thomas Butler*, whom she survived, and sold her share of the premises in question to her sister *Elizabeth* before 1723. *Elizabeth* married *William Pierrepoint*, survived her husband, and died, without issue, in 1758. *Frances* had issue by the archbishop *Elizabeth Dawes* and Sir *Darcy Dawes*. *Elizabeth Dawes* (through whom the lessor of the plaintiff claimed) *married Sir *William Milner* (the grandfather of the lessor) in 1716, and died in *March* 1782. They had issue a son *William*, who died in 1774, leaving the lessor of the plaintiff his eldest son and heir. Sir *Darcy Dawes* married *Sarah Roundell* in 1723, and died in 1732. *Sarah* Lady *Dawes* died in 1773. They left a daughter *Elizabeth*, who in 1746 married *Edwin Lascelles*, the

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stances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance by the general law of copyhold, and the title of a tenant by the curtesy being also by the operation of law.

And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him *pursuant to the settlement*, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death.

And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted; and the steward of the manor, appointed by the heir at law and her husband, had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime), for above 20 years back, debited himself with the receipt of 2-3ds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-3ds as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband, who set up an adverse possession for above 20 years after the wife's death.

Nor will any release from the heir at law living at the time of such curtesy-estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release if proved or presumed would bar the copyholder's claim.

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late Lord *Harewood*. She died in 1764, and her husband Lord *Harewood* in 1795; having had issue by her husband a daughter who died shortly after her birth. the defendant was the tenant in possession under the present Lord *Harewood*, brother of the late Lord, from whom he claimed the premises in question by devise, he having surrendered to the use of his will.

It appeared from the court-rolls that *Darcy Dawes* (son and heir of *Frances* Lady *Dawes*, then late the wife of the Rev. Sir *William Dawes*), *Maria Butler*, widow, and *Elizabeth Pierrepoint*, widow, who were the daughters and co-heirs of Sir *Thomas Darcy*, Bart. were admitted in 1712 to hold to them and their heirs as coparceners. But no surrender or admission appeared to have been made on the part of either of those three persons, or any one descended from either of them (including Mrs. *Lascelles*), until the admission of the lessor of the plaintiff, which was in *July* 1808, in which admission he is stated to claim as heir at law, according to the custom of the manor, of *Elizabeth Lascelles*, theretofore *Elizabeth Dawes*, daughter of Sir *Darcy Dawes*, Bart. deceased, and also as grandson and heir of Sir *William Milner*, Bart. deceased.

On the part of Lord *Harewood*, who defended this ejectment,
[585] was produced the settlement on marriage of Sir *Darcy Dawes* (the father of Mrs. *Lascelles*) with *Sarah Roundell*, dated in 1723, to which the archbishop his father (who had married *Frances* one of the daughters and three coheiresses of Sir *Thomas Darcy*) and *Elizabeth Pierrepoint* (another of the coheiresses) were also parties. From the recitals in that settlement it appeared that the three portions to which Sir *Darcy Dawes* (as heir of his mother Lady *Frances*), *Maria Butler*, and *Elizabeth Pierrepoint*, had been respectively admitted in 1712, as coheirs of Sir *Thomas Darcy*, were thus circumstanced. In 1-3d the archbishop had an interest for 99 years determinable on his life; the inheritance being vested in his son *Darcy*. And in this third an estate for life was limited by the settlement to *Sarah Roundell:* but the deed recites that no surrender could be made of such third part to the uses of the settlement by reason of the then minority of *Darcy Dawes*; he not being specifically enabled to make a surrender by the private act of parliament which had been passed to authorize the settlement during his minority. Therefore the archbishop and his son *Darcy* covenanted with the trustees that *Darcy Dawes* would when of age surrender this 1-3d to the uses of the settlement. No such surrender however was ever made. As to the other 2-3ds, the settlement recited that

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that *Elizabeth Pierrepoint* had purchased her sister *Maria Butler's* 1-3d, and was then in possession of both. *Sarah Roundell* (Lady *Dawes*) continued in the reception of 1-3d of the rents of this copyhold till her death in 1773. Another instrument proved was the marriage settlement in 1746 of the late Lord *Harewood* (then *Edwin Lascelles*) with *Elizabeth*, the daughter of Sir *Darcy Dawes*, in which it is recited that the said *Elizabeth* was entitled to certain lands (comprising those in question, partly in possession, and partly expectant on the death of *Elizabeth Pierrepoint*, and in part also expectant on the death of her mother *Sarah* widow of her father: that the said *Elizabeth Dawes*, being then under age and incapable of making a settlement, it was covenanted that all her said property in possession or reversion should be settled afterwards; and that all the property moving from either party should be ultimately limited on failure of issue to the survivor of Mr. and Mrs. *Lascelles* in fee. These trusts and covenants were accordingly carried into execution by a subsequent deed of the 25th of *October* 1750, after Mrs. *Lascelles* came of age, when similar trusts were created. Mr. and Mrs. *Lascelles* levied a fine of the freehold estates in settlement, of *Mich.* 24 *Geo.* 2., and in 1766 Mr. *Lascelles*, after the death of his wife, who died in 1764, but during the life of her mother *Sarah* Lady *Dawes*, who lived till 1773, was admitted to the copyhold in question by an entry which stated that he claimed to be admitted to all the *three* portions, by virtue of the settlement upon his marriage with *Elizabeth Dawes;* the habendum on such admission being to *Edwin Lascelles, pursuant to the said marriage settlement.* It appeared from the accounts of a deceased steward of the manor and of the lands in question, that in 1770 he had charged himself thus: "*Golden Griggs* (the steward) Dr. to *Edwin Lascelles* Esq. and Lady *Dawes* (meaning *Sarah* Lady *Dawes*) for rents received of *C. Richards* (the tenant) a year's rent 42*l.* to *Michaelmas* 1769, two-thirds—*Edwin Lascelles* Esq., one-third—Lady *Dawes*, of all the receipts."

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A question then arose, whether, though there had been no surrender to the uses of the settlements, the possession of *Edwin Lascelles* (the late Lord *Harewood*), grounded upon his admission in 1766, were not at any rate any adverse possession to the plaintiff's claim as to the 2-3ds, from that period, and as to the other third, from the death of *Sarah* Lady *Dawes* in 1773. To rebut which it was alleged, on the part of the plaintiff, that the late Lord *Harewood* had in him a curtesy estate by the custom, from the death of his wife in 1764 to his own death in 1795,

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which would have been a good defence to any ejectment brought by the lessor of the plaintiff as heir at law, or those under whom he claimed. In answer to which it was insisted on the part of the defendant, that in order to constitute a right to an estate by curtesy, it was in all cases necessary for the wife to have been admitted (*a*) to the copyhold in her lifetime (which she was not in this instance), and that such was the custom of this particular manor: as to which the evidence stood thus. The steward of the manor proved that tenancy by the curtesy of *England* prevailed by custom in this manor; but that in all the instances he had found on the court-rolls, from whence he derived his knowledge, the wife had been previously admitted; though there was no known distinction of that sort; nor did he know of a husband's enjoying without being himself admitted after his wife's death. And he produced three instances from the rolls. The first was that of *Samuel Payne*, who was admitted in *October* 1766 on the death of his wife, who had herself been admitted in *December* 1751. The second was from an entry of the 7th of
[588] *October* 1766, which recites that *Sarah* the wife of *Samuel Clay* had been admitted to her and her heirs; and that she and her husband had surrendered to the use of her will: and at this Court it was presented that *Sarah* had died seised of the premises and *Samuel Clay* informed the Court that his wife had made no will, and prayed to be admitted by the *curtesy of* England *and according to the custom.* The third was an entry of the 4th of *September* 1798, by which it appeared that *Susannah Harvey*, having been admitted, had died, and that her husband was admitted *tenant by the curtesy and by the custom.* The steward also said, that it did not appear from the rolls whether or not it were essential to the claim of a tenant by the curtesy that there should have been issue born. Upon this part of the case the Ld. Chief Baron considered that the previous admission of the wife was not necessary; the admission of the husband being, as he conceived, analogous to an admission upon a descent. In neither case does any thing move from the lord or any surrenderor; and the curtesy estate was permitted to obtain by reason of the inheritable capacity of the child when born, and was continued in the person of the husband during his life; and the want of admission of the mother would have been no objection to the claim of the child to inherit if it had lived. And as to the steward's not knowing of any distinction of the sort contended for, the

(*a*) See *Ever* v. *Aston*, *Moor*, 271. and 1 *And.* 192.

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learned Judge considered the evidence to be no more than this, that he knew of no reputation in the manor to that effect: and the fact of admission of the wives in the three instances produced, which were the foundation of the steward's knowledge on the subject, he though of little weight; as in the greater number of instances it would happen that women entitled to copyholds would be admitted, as they ought and were compellable to be: and there was no evidence of any husband's claim having been rejected on the ground of the non-admission of his wife. And the mere fact of the three husbands, in the instances adduced, [589] having been admitted after the death of their wives, appeared to the learned Judge not to have sufficiently established that qualifying restriction to form a part of the custom.

Another objection was, that the seisin of Mrs. *Lascelles* was not sufficiently proved, inasmuch as the earliest receipt of rent proved was in 1770, for a period subsequent to her death in 1764. But the Ld. Chief Baron thought that, as the legal interest in this estate descended upon Mrs. *Lascelles* upon the death of her father Sir *Darcy Dawes* in 1732 as to 1-3d, and as to the other 2-3ds, on the death of *Elizabeth Pierrepoint* in 1758, and that the steward of the estate had been long dead; and that, as there was no proof that the rents had been paid to any other person, such payment in 1770 was reasonable evidence of the receipt of prior rents by Mr. *Lascelles* in the lifetime of his wife, and was reasonable evidence also of the perception of 1-3d part of them by *Sarah* Lady *Dawes*, That at law the trusts of the settlement of *Sarah* Lady *Dawes* in 1723, and of that of 1746, could not be adverted to, as they created interests purely equitable, and no surrenders had been made to the uses of either of them: and therefore the only point for consideration at law was as to the course of descent of the three undivided parts of the copyhold. With respect to the 1-3d to which *Maria Butler* was admitted in 1712, and which was purchased of her before 1723 by *Elizabeth Pierrepoint* her sister; and with respect to the 1-3d to which *Elizabeth Pierrepoint* herself was admitted at the same time, it seemed clear that those two portions had descended upon their nephew Sir *Darcy Dawes*, and from him upon his daughter Mrs. *Lascelles;* and her husband Mr. *Lascelles* having had issue inheritable by her, the learned Judge thought would have entitled him to admission as tenant by the curtesy, if the objections made [590] on the part of the defendant were not well founded; and that upon the expiration of the husband's curtesy estate by his death in

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in 1795 without issue, the legal estate descended upon Sir *William Milner* as heir of *Elizabeth Lascelles*.

But it was urged, that the defendant was at all events entitled to a verdict for the remaining third, to which *Frances* Lady *Dawes*, the common ancestor of all these parties, was admitted in 1712, and in which *Sarah* Lady *Dawes*, the wife of Sir *Darcy*, had an equitable interest for life under her marriage settlement which terminated with her life in 1773; and of which Mr. *Lascelles* had an adverse possession commencing upon his admission to the entirety in 1766, But the Lord Chief Baron was of opinion; that as no surrender had been made to the uses of that settlement, he could not at law take notice of the equitable agreement which the parties had thought fit to execute by handing over to *Sarah* Lady *Dawes* the rents and profits of this 1-3d during her life. That upon the death of Sir *Darcy Dawes* in 1732, to whom the legal interest of this third had descended from his mother, it also descended on his only child Mrs. *Lascelles*, and that her husband had also become entitled to a curtesy estate in this third, as well as in the two other thirds.

It was then contended for the defendant, that a release from those under whom Sir *William Milner* claimed ought to be presumed after so long a time. But the Ld. Chief Baron was of opinion, that although Mr. *Lascelles* had in fact been admitted by the lord upon a title purely equitable, and if that had been his *only* title, his possession must have been considered as adverse; as an equitable title, was to that purpose no title whatever; yet
[591] as it appeared to him that the legal title in all the three portions had centered in *Elizabeth Lascelles* Lady *Harewood*, a curtesy estate accrued to her husband in the whole; and that no presumption could take place of his possessing the estate by virtue of a release grounded on some other title. And if on the other hand he were to be considered as having been in possession adversely for above 20 years, he did not require the aid of any such presumption for his defence.

Upon the whole the learned Judge was of opinion, that, dismissing the consideration of all equitable interests not grounded on any surrender, so as to clothe the trustees with the legal estate, the legal inheritance of the three undivided parts to which Sir *Darcy Dawes* (in right of his mother *Frances*), *Maria Butler*, and *Elizabeth Pierrepoint* were admitted in 1712, centered first in *Elizabeth Lascelles* (Lady *Harewood)*; that her husband became tenant by the curtesy according to the custom of the manor; and that by his death in 1795 the same became vested in the present lessor

lessor of the plaintiff as heir at law of Lady *Harewood*. And he was also of opinion, that possession on the part of her husband for more than 20 years, in order to bar the lessor of the plaintiff, ought to have been an adverse possession only: but that if there were in him a good legal title, which would have furnished a clear defence to any ejectment brought against him during his life, no laches could be imputed to the party in whom the fee rested, for not having proceeded before the expiration of 20 years, or at any time before the death of the tenant by the curtesy. And on this direction a verdict passed for the plaintiff.

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A new trial was moved for in last *Michaelmas* term, in order to take the opinion of the Court upon these several points, against which *Shepherd* Serjt., *Garrow*, *Lawes*, and *Pitcairn*, shewed cause in this term; and *The Attorney-General*, *Marryat*, and *Gurney*, were heard in support of the rule. In the absence of Lord *Ellenborough*, who was indisposed, the Court took time to consider of their judgment, which was now delivered by

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Grose J. This was an ejectment for certain copyhold premises in *Essex*, which was tried before the Lord Chief Baron at the last assizes at *Chelmsford*, in which a verdict was found generally for the plaintiff. A rule was obtained in *Michaelmas* term last on behalf of the defendant, to shew cause why there should not be a new trial. The matter came on to be argued on the second day of this term, in the absence of my Lord Chief Justice. By the report it appeared that the lessor of the plaintiff claimed as heir at law of Mrs. *Lascelles*, who was heir at law of Sir *Darcy Dawes*, *Maria Butler*, and *Elizabeth Pierrepoint*, who had been admitted to these premises in 1712, to hold to them and their heirs, and which premises, on their deaths, descended to Mrs. *Lascelles* as their heir at law. But no admission to the premises in question appeared on the court-rolls from the time of the admission of Sir *Darcy Dawes*, *Maria Butler*, and *Elizabeth Pierrepoint*, in 1712, down to the year 1766, when Mr. *Lascelles* was admitted to the premises, to hold to him and his heirs; and afterwards, in 1807 or 1808, the lessor of the plaintiff was admitted to the same premises. Mrs. *Lascelles* died in 1764, leaving her husband *Edward Lascelles*, afterwards Lord *Harewood*, her surviving, and having had issue by him a daughter, who had died within a year after her birth. Lord *Harewood* lived till 1795.

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On the part of the defendant, who claimed under the present Lord *Harewood*, it was contended, 1st, that here had been an adverse

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adverse possession from the death of Mrs. *Lascelles* in 1764, upwards of 40 years. To this it was answered, that by the custom of the manor the husband was entitled to hold the copyhold tenements of his wife, after her death, for his life, in the nature of tenant by the curtesy; and that Lord *Harewood* having survived his wife, and lived till 1795, there was no possession adverse to the title of the lessor of the plaintiff till after that time; inasmuch as the heir at law of Mrs. *Lascelles* could not recover the possession of the premises while her husband's estate by the curtesy existed. And to prove the custom of the manor as to the right of the husband, in the nature of tenant by the curtesy, three entries were read from the court-rolls: the first, an admission of *Samuel Payne* in *October* 1766, on the death of his wife, who had been herself admitted in *December* 1751. The second, of the 7th of *October* 1766, which recited that *Sarah* the wife of *Samuel Clay* had been admitted to her and her heirs, and that she and her husband had surrendered to the use of her will: and it was presented that *Sarah* had died seised of the premises; and *Samuel Clay* informed the Court that his wife had made no will, and prayed to be admitted by the curtesy of *England* and according to the custom. The third, of the 4th of *September* 1798, by which it appeared that *Susannah Harvey*, having been admitted, had died; and that her husband was admitted tenant by the curtesy and by the custom. To this evidence of the custom it was objected on the part of the defendant, that it appeared from the three entries above stated, that the wife had been previously admitted; and as there was no evidence of the custom but these entries on the rolls, there did not appear any custom for the husband to enjoy as tenant by the curtesy, except where the wife had been in her lifetime admitted; which was not the case here, as Mrs. *Lascelles* had never been admitted, and therefore her husband could not bring himself within the custom. But we think on this point, that the admission of the wife is not a necessary ingredient by the custom to entitle the husband to hold for his life, in cases where the title of the wife is complete without admission by the general law of copyholds; as is the case where her title is as heir; in which case any person may derive title through her by operation of law without admittance; and the title of the husband is by operation of law. In the present case Mrs. *Lascelles*'s title was as heir to the three coparceners: her title was complete without admission, to all purposes, except as against the lord, with respect to his right to his fine: and therefore we think that the entries given in evidence were sufficient to support the custom of

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tenancy

tenancy by the curtesy, without the qualification of admittance of the wife, inasmuch as her title was such as not to require admittance to perfect it.

The plaintiff then proved in evidence the accounts of a former steward of this estate in 1770, now deceased, in which he charges himself thus: "*Golden Griggs* (the steward) Dr. to *Edwin Las-* "*celles* Esq. *and Lady Dawes*, for rents received of *C. Richard-* "*son* (the tenant) a year's rent 42*l.* to *Michaelmas* 1769.—Two- "thirds *Edwin Lascelles* Esq.—one-third, Lady *Dawes.*" This Lady *Dawes* was the mother of Mrs. *Lascelles;* to which Lady *Dawes* a life estate had been limited on her marriage in one-third part of the premises in question; but, for want of a surrender, [595] the limitations of that settlement, as to the copyhold part, were not valid at law. And on this evidence it was contended for the defendant, that although it afforded fair ground for the jury to find Mrs. *Lascelles* in her lifetime, and afterwards Mr. *Lascelles*, in possession of two-thirds of the premises till his death, by receipt of two-thirds of the rents and profits; yet it shewed them out of possession of the remaining one-third, of which Lady *Dawes* was in possession, which possession was adverse to the lessor of the plaintiff. And that at all events therefore the defendant is entitled to a verdict in his favour as to this one-third. But on this point we think that no distinction can be made between the 2-3ds and the 1-3d; for the payment of the 1-3d of the rents, being made to Lady *Dawes* under her equitable title by the steward of the whole estate, must be considered as a payment made to her by the order and with the consent of the person entitled at law to the whole, in consideration of the equitable claim, that is, by Mrs. *Lascelles* in her lifetime, and Mr. *Lascelles* after her death; and amounts to the same thing as if they had received the whole rent, and afterwards paid 1-3d to another person to whom they had by an instument not valid in law agreed to pay it.

The third objection made by the defendant to the plaintiff's title to recover, is that here was ground to presume a release from Sir *Wm. Milner*, or some person under whom he claimed: and it was correctly stated at the bar that although copyhold premises can only pass by surrender, and not by release, yet that a release given by a person claiming title to a person in actual possession will extinguish such releasor's title or claim: and that in this case Mr. *Lascelles* having been actually admitted tenant on the court-rolls in 1766, and in possession of the estate, was capable [596] of taking a release from the lessor of the plaintiff, Sir *Wm. Milner*, or from his grandfather, who survived his father and died in 1782.

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1782. On this point however, we do not see sufficient ground for presuming such release: for Sir *Wm. Milner*, the grandfather, died during the continuance of the estate by curtesy of the late Lord *Harewood*, during which time the grandfather, Sir *Wm. Milner*, could not have set up any claim to the possession of this estate: and from the death of the late Lord *Harewood* to the present time the title has been in the present lessor of the plaintiff, from whom a release shall not be presumed, especially when he might by proceedings in equity, be called on to discover whether such release were ever executed by him. We therefore think that the verdict in favour of the plaintiff for the whole is right, and that the rule for the new trial should be discharged.

END OF HILARY TERM.

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INDEX

OF THE

PRINCIPAL MATTERS.

ABATEMENT.

1. ONE indicted for a misdemeanor may plead in abatement a misnomer of his surname, *Shakepear* for *Shakespear*; which shall not be taken for idem sonans: and the plea, concluding with *praying judgment of the said indictment, and that he may not be compelled to answer the same*, is good. *The King*, v. *Shakespeare*, T. 48 *G.* S. 83
2. In abatement the Court will give no other than the proper judgment prayed for by the party; but in the case of pleas in bar, the Court will give that which appears to them to be the proper judgment upon the whole record, whether regularly prayed for or not. *ib.*
3. A plea of ancient demesne was permitted to be filed de bene esse within the four first days, pending a rule nisi for permission to allow the plea so filed. *Doe dem. Morton* v. *Roe*, *H.* 49 *G.* 3. 523

ACCOUNT STATED.

See ASSUMPSIT, 2.

ACTION ON THE CASE.

See PLEADING, 14.

ADMIRALTY,

See ASSUMPSIT, 4.

The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be sea-worthy, or repairable so as to carry the cargo to its place of destination, but at an expence exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to *sell* the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised bonâ fide in a case of necessity, still the vessel, subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repairs on the spot, can only be conveyed by the captain in the

the form prescribed by the register acts; and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee. *Reid* v. *Darby*, *T.* 48 *G.* 3. 143

ADMINISTRATOR AND EXECUTOR.

1. Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial; and they may sue in their own right. *Hollis* v. *Smith*, *M.* 49 *G.* 3. 293
2. A count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors, and assigns, may be joined with another count, charging them that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one *D. A.*, against whom breaches were alleged; and concluding that so neither the testator, nor the defendants after his death, nor *D. A.* since the assignment to him, had kept the said covenant, but had broken the same. And plene administraverunt may be pleaded to both counts. *Wilson* v. *Wigg*, *M.* 49 *G.* 3. 313
3. It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead plene administravit of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading plene administravit by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any devastavit by the first executor could be made good. *Wells* v. *Fydell*, *M.* 49 *G.* 3. 315

AFFIDAVIT *to hold to bail.*

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiffs so much for interest-money, under and by virtue of *an agreement*, is not sufficient. *Brook* v. *Trist*, *M.* 49 *G.* 3. 358

ANCIENT DEMESNE.

See ABATEMENT, 3.

ANNUITY.

The grantor of an annuity, and his sureties having given their joint and several bond, whereby they bound themselves, their *heirs*, executors, and administrators, to secure the annuity; a memorandum stating generally that they *became bound* to the grantee, &c. though it may be good, without stating that they became *jointly and severally* bound, as not being inconsistent with the extent of their obligation; yet is bad, for the omission of stating the extent of the security in respect to their *heirs*; these not being bound as personal representatives are without being named. *Horwood* v. *Underhill*, *T.* 43 *G.* 3. 123

APPEAL.

Though an appeal against an order of removal has been entered and adjourned once by virtue of the stat. 9. *G.* 1. *c* 7. *s.* 8: and though the justices in sessions have a discretionary power to determine whether reasonable notice has been given of the appellant's intention to proceed on the trial of such adjourned appeal; yet if they dismiss the appeal at such adjourned sessions, without hearing it, on the ground that they have no authority to try it for want of a sufficient length of notice to the respondents, according to a new rule of practice promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney, who had given the former usual notice: this court will grant a mandamus to the sessions to enter continuances and hear the appeal. *The King* v. *the Justices of Wiltshire*, *M.* 49. *G.* 3. 404

ARREST OF JUDGMENT.

See PLEADING, 14.

ASSUMPSIT.

1. A wagering contract for 50 guineas, that

that the plaintiff would not marry within six years, is primâ facie in restraint of marriage, and therefore void; no circumstances appearing to shew that such restraint was prudent and proper in the particular instance, *Hartley* v. *Rice*, *T.* 48 *G.* 3. 22

2. A collector or rentor of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that she should have *the remainder* next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls. *Peacock* v. *Harris*, *T.* 48 *G.* 3. 104

3. The authority of one partner to bind another, by signing bills of exchange and promissory notes in their joint names, is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. *Lord Viscount Galloway*, v. *Mathew and Another*, *M.* 49 *G.* 3. 264

4. Where in a charter-party freight was to be paid at so much per ton, *on a right and true delivery of the homeward-bound cargo* from *Honduras Bay to London;* and the ship and cargo, after capture and re-capture, having been wrecked at *St. Kitts*, into which they were carried by the re-captors, a sale of the cargo was directed by the vice-admiralty court there, on the application of the master, acting bonâ fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro-ratâ itineris. For such form of action for the proceeds of an illegal sale of goods, is only a waver of any claim for *damages* for the tortious act; taking the actual proceeds of the sale as the value of the goods, (subject to the legal consequences of considering the demand as a debt; which admits of a set-off, &c.) but does not recognize the right of the vendor so to convert the goods. And here the act of conversion (for such it must be taken to be) being made by the master, who is the general agent of the ship owners; (and not as in *Baillie v. Modigliani*, by the act of a court of competent jurisdiction,) was unlawful, and discharged the claim of the ship-owners for freight pro-ratâ itineris, *Hunter* v. *Prinsep*, *M.* 49 *G.* 3. 378

5. But the plaintiff could not recover against the ship owners, upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject matter by a contract not under seal, and signed by their master only, and not by themselves. *ibid.*

6. Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship to freight to the defendants on a voyage from *Shields to Lisbon*, with convoy; *the freight to be paid on right delivery of the cargo;* the ship having sailed from *Shields* with her cargo, and joined convoy at *Portsmouth;* and after being detained near a month off *Lymington*, her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants have refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice

to the defendant, and then was sold by consent of both parties without prejudice: held that the plaintiff could not recover freight pro ratâ, or demurrage. *Liddard* v. *Lopes, H.* 49 *G.* 3. 526

7. The master and the freighter of a vessel of 400 tons having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to *St. Petersburg*, and there load from the freighters' factor a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same, on being paid freight, &c.; held that the master, after taking in at *St. Petersburg* about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on *British* ships by the *Russian* government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted bonâ fide, and under a reasonable and well-grounded apprehension at the time; and a hostile embargo and seizure was in fact laid on six weeks afterwards. *Atkinson* v *Ritchie, H.* 49 *G.* 3. 530

ATTACHMENT.

See INSOLVENT DEBTOR, 1.

BAIL IN ERROR.

Bail in error is not necessary upon the stat. *Jac.* 1. *c.* 8. in debt on bond conditioned for the payment of money, *and also for performing covenants in a mortgage deed. Butler* v. *Brushfield, M.* 49 *G.* 3. 407

BAIL-BOND.

Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first day of term, being the return-day of the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of 17 miles; held sufficient to discharge the bail-bond, of which the plaintiff had taken an assignment afterwards, with notice of such surrender. *Plimpton* v. *Howell, T.* 48 *G.* 3. 100

1. A new assignee of a bankrupt may sue in debt upon a judgment recovered by a former assignee, displaced by the Lord Chancellor; which judgment was, "for damages sustained, for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee, *as such*, after the bankruptcy." For such recovery will be presumed to have been for injuries done to the bankrupt's estate and effects. And the plaintiff may declare in a general form, as having been *duly* constituted and appointed assignee, &c. *De Cosson* v. *Vaughan, T.* 48 *G.* 3. 61

2. A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Spildt* v. *Bowles, M.* 49 *G.* 3. 279

3. Two of three partners affecting but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners having in the mean time committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being all the time abroad. Held, 1st. That by such indorsement of the bill by the two, after-acts of bankruptcy committed by them, though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any control over the joint stock as partners, and therefore could not bind either the property

perty of their assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received, to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, That such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs. *Thomason, jointly with Hipgip and others, Assignees of Underhill and Guest, v. Frere, H.* 49 *G.* 3. 418

BEECH.

See TIMBER, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PARTNER, 1.

A promissory note for 100*l.* payable to plaintiff or order, and originally expressed to be *for value received*, generally being altered the next day upon the suggestion of one of the parties, by the addition of the words *for the good-will of the lease and trade of Mr. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill* v. *Williams, H.* 49 *G.* 3. 431

BILLS OF LADING.

Where in a charter-party freight was to be paid at so much per ton, *on a right and true delivery of the homeward bound cargo* from *Honduras Bay* to *London;* and the ship and cargo, after capture and recapture having been wrecked at *St. Kitts*, into which they were carried by the receptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master acting bonâ fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the shipowners. Held that the freighter might recover such proceeds in assumpsit for money had and received without allowing freight pro ratâ itineris. But he could not recover against the shipowners, upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect to the same subject matter by a contract not under seal, and signed by their master only, and not by themselves. *Hunter* v. *Princep, M.* 49 *G.* 3. 378

BOND.

See ANNUITY, 1.

1. The laches of obligees in a bond, (conditioned for the principal obliger to account for and pay over from time to time all such tolls as he should collect for the obligees,) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel *at law* in an action against the sureties. *The Trent Navigation Company* v. *Harley, T.* 48 *G.* 3.
2. The Prince of *Wales* having granted an annuity for his own life, payable by the treasurer of his privy purse, which annuity was assigned by the grantee to another with the Prince's assent; and a surety having given bond to the assignee of the annuity, conditioned to pay it, if the Prince, or the treasurer of his privy purse, or any other person for the Prince, did not pay it at the respective quarter-days: held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer, as required in all cases within the stat. 35 *G.* 3. *c.* 125. *s.* 7. on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect. *O'Kelly* v. *Sparkes, M.* 49 *G.* 3. 369

BOOKS.

See EVIDENCE, 1. 2.

BUILDING ACT.

Where notice of pulling down and rebuilding

building a party-wall was given under the building act 14 *G.* 3. *c.* 78., and the tenant of the adjoining house, who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expences to be incurred and paid by the owner of the house giving notice in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same; held that he could not recover over against his landlord such expences incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the act in respect of any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant-money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house. *Robinson* v. *Lewis, T.* 48 *G.* 3. 227

CARGO.

See SHIP, 3, 4.

CARRIAGES.

See TURNPIKE. 1.

CASE EXPLAINED.

1. *Molton* v. *Cheesley.* 21

CHARITABLE USES.

See MORTMAIN, 1.

CHARTER-PARTY.

See ASSUMPSIT, 4, 5, 6.

1. The clauses in the *East India* Company's charter-parties, whereby the Company agree to allow 200*l.* per month for provisions while the ship remains in *India* or *China*, to be computed from the delivery of the Company's dispatches (if any) at the ship's "*first consigned port*, until she should be dispatched from her *last port* in *India* or *China* to return to *Europe*," is to be understood of her *last consigned port*; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions,) on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again dispatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again dispatched her for *Europe*, they paid the 200*l.* a-month for that period. And the 14*l.* covenanted to be paid by the Company to the ship-owner *in England* for each passenger ordered on board the ship in *India* by the Company's agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames*. *Moffat* v. *The East India Company, H.* 49 *G.* 3. 468

2. A covenant in a charter-party of affreightment, that the owner shall at his expence *forthwith* make the ship tight and strong, &c. for a voyage for twelve months, &c. and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service and used her for a certain period; but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making *any* use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action.—*Havelock* v. *Geddes, H.* 49 *G.* 3. 555

3. A ship having been let to freight for twelve months, and for such longer period as the freighter should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c.; it is no answer to a breach for non-payment of six months' freight due at the end of ten months, that the owner had covenanted to *keep* the

the vessel *in repair* during the time she was freighted, and that she was not in repair *when* the freighter *shipped goods* on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months, and that he had paid the freight for all the time she was serviceable, and that she was not in his service for 10 months in the whole: for non constat but that, after she had been used by the freighter, she wanted repair. without any default of the owner, or that he was guilty of any delay in making the repairs: and the freight would still run on during the time of repair. *Havelock* v. *Geddes*, *H.* 49 *G*, 3. 555

4. The freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from 4 month to 4 months, (after the first 2 months) and the ship were lost before the end of 14 months. *ib.*

5. An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid *till the ship's discharge, or return from her voyage;* and the ship having sailed on a voyage to *St. Domingo*, where she arrived, but was burnt before her return; held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter; on which such extra allowance became payable. *ib.*

COAL MINE.

See COPYHOLD, 1.

COVENANT, 2.

COLLEGE.

See MORTMAIN, 1.

CONDITION PRECEDENT.

See CHARTER-PARTY. 2, 3, 5.

FREIGHT, 2. 6.

CORNWALL.

See MINES, 3.

CONVICTION.

The statute 42 *G.* 3. forbids corn making into malt to be wetted while it is a-floor before 12 days from the time when it is emptied out of the cistern. Then statute 46 *G.* 3. *s.* 1. repeals that provision generally, and enacts (sect. 3.) that the corn in that state shall not be wetted till 9 days, &c. after the 1st of *August* 1806. Then sect. 14. enacts that this act shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st of *August* 1806, and shall continue in force till the 25th of *March* 1807. Held that incorporating the 14th with the 1st sect. this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of *March* 1807, and a subsequent act reviving and continuing the 46 *G.* 3. *The King* v. *Rogers*, *H.* 49 *G.* 3. 569

COPPER.

See MINES, 3.

COPYHOLD AND CUSTOMARY ESTATES.

1. The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same; and the copyholder may maintain trespass against him for so doing. But where the defendant justified under the lord, as being seized in the fee of the veins of coal lying under the copyhold tenements, *together with the liberty of boring for and getting the coal*, &c., it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse *the liberty* of working

ing the mines; because the plea claims such liberty not merely as annexed to the seisin in fee to be exercised when in actual possession, but as a present liberty to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it. *Bourne* v. *Taylor*, *T.* 48 *G.* 3. 189

2. One who has a primâ facie title to a copyhold is entitled to inspect the court-rolls, and take copies of them, so far as relates to the copyhold claimed though no cause be depending for it at the time. *The King* v. *Lucas*, *T.* 48 *G.* 3. 235

3. Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, and devised to *A.* for life, without impeachment of waste, with remainders over; though there was no instance in fact of a copyholder for life in the manor cutting timber; yet the right being annexed to the fee and inheritance, the copyholder in fee in carving out his estate may make a tenant for life dispunishable of waste; and at any rate, the lord cannot enter upon the copyholder for life's estate, as for a forfeiture, upon his cutting timber; for the injury, if any, is to the remainder-man of the inheritance. *Denn d. Joddrell* v. *Johnson*, *M.* 49 *G.* 3 166

4. Entries on the rolls of a manor court, of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held *during her chaste viduity*, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence; although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced. *Doe dem. Askew* v. *Askew*, *H.* 49 *G.* 3. 520

5. A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of *England* according to the custom of the manor; though the only evidence of such custom on the rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance, by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law. *Doe d. Milner* v. *Brightwen*, *H.* 49 *G.* 3. 583

6. And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to the settlement, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death. *Doe d. Milner* v. *Brightwen*, *H.* 49 *G.* 3. 583

And though 1-3d of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustess under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted; and the steward of the manor appointed by the heir at law, and her husband had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime) for above 20 years back, debited himself with the receipt of 2-3rds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-3ds, as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. *ibid.*

Nor

Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release if proved or presumed would bar the copyholder's claim. *ibid.*

CORPORATION.

One who has not taken the sacrament within a year, being incapable of being elected into a corporate office by stat. 13 *Car.* 2. *c.* 12. his disqualification was held not to be removed by the annual act of indemnity (47 *G.* 3. *st.* 2. *c.* 35.) the 6th sect. of which retrains its operation in cases where the office shall have been "already legally *filled up and enjoyed* by any other person," at the time of passing the act: the fact being, that the defendant and another were candidates at the time of election, when 40 electors were assembled; and after 2 electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidates in the affirmative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being 20 in number, except 2 or 3; and 16 afterwards voted for the other. Held,

1st. That all the votes given for the defendant after such notice were thrown away.

2dly, That the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice.

3dly, That the presumption of law being that every person has conformed to the law till something appear to rebut that presumption; it must be taken that the other candidate, who affirmed his qualification, which were not negatived by the jury, was duly qualified: and that such his election, perfected by swearing in, was a *filling up and enjoying* by him of the office, within the proviso of the indemnity act, so as to preclude its operation by relation in favour of the defendant. *The King* v. *Hawkins, T.* 48 *G.* 3. 211

COSTS.

1. An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on the stat. 8 and 9 *W.* 3. *c.* 11. *s.* 2. which is confined to judgments for defendants on demurrer. *Golding* v. *Dias, T.* 48 *G.* 3.
2. Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial, and they may sue in their own right. *Hollis* v. *Smith, M* 49 *G.* 3. 293
3. After verdict for the defendant, and a new trial awarded upon a question of law, without any thing said as to costs; and instead of proceeding to a second trial, the parties agree to state the facts specially, as if, in a case reserved at the trial; on which the postea is afterwards delivered to the plaintiffs; they are entitled to the costs of the first trial. *Robertson* v. *Liddell, H.* 49 *G.* 3. 416
4. Debt on bond, where the plaintiff recovers a verdict for nominal damages only, and takes his judgment for the penalty, is not within the relief of the stat. 43 *G.* 3. *c.* 46. *s.* 3. enabling the Court to allow the defendant costs if the plaintiff do not *recover* the amount of the sum for which he had held the defendant to bail. *Cammack* v. *Gregory, H.* 49 *G.* 3. 325

COVENANT.

See PLEADING, 10, 11.

1. In a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted for himself his executors, &c. *and assigns*, not to have persons to work in the mill who were settled in other parishes, without a parish certificate. held that this covenant did not run with the

land, or bind the assignee of the lessee. *The Mayor, &c. of Congleton* v. *Pattison, T.* 48. *G.* 3. 130

2 In covenant on an indenture of demise of a coal mine, made on the 8th of *July* 1805, reserving 1-4th of the coal raised, or the value in money, at the election of the lessor; and if the 1-4th fell short of 400*l.* per annum, then reserving such additional rent as would make up that *annual* sum, to be rendered *monthly* in equal portions: held that the lessor having elected to take the whole in money may declare for *two years and three months'* rent in arrear. But even if the money rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th, or the value in money, &c. but had refused, &c.; held that it would not hurt on *general* demurrer, that the count went on to allege, that before the exhibiting of the plaintiff's bill, *viz. on the* 1*st of* November 1792, 900*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill 900*l.* of the rent reserved, &c. was due, is sufficient. *Buckley* v. *Kenyon, T.* 48 *G.* 3. 139

CRIM. CON.

See VENUE, 1.

CUSTOM,

See TIMBER, 1. MANOR, 1.

DEBT ON JUDGMENT.

See BANKRUPT, 1.
PLEADING, 2.

DECLARATIONS—*By deceased Persons.*

See EVIDENCE, 1.

DEED.

See SHIP, 4.

A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the locus in quo under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in court, of which *the date and names of the parties are unknown. Hendy* v. *Stephenson, T.* 48 *G.* 3. 55

DEMURRER.

See PLEADING, 14, 15.

DEVISE.

See MORTMAIN, 1.

1. *A.*, having no issue, and being tenant in tail under the will of Dr. *G.*, with remainder to *B.* and *C.* for life, remainder to the heirs of their bodies, for such estates and in such proportions as they or the survivor should appoint, and in default of such appointment, remainder to the heirs of the body of *B.*, with remainders over; made his will, whereby, after devising certain estates to trustees to sell and apply the purchase money amongst different relations, and directing them to sell all other his real estates, and apply the money to some of those relations; he gave 5*l.* apiece to *C.* (who survived *B.*) and to *D.* the only child of *B.* and *C.*, "in consideration of the ample "provision made for them after my "decease by Dr. G., who has by his "will devised to them certain estates "in *R.*, now in my possession, which, "though I could now legally dispose "of, I mean fully to *confirm* to them; "according to the intent of the said "will." After this *A.* suffered a recovery, and declared the uses to himself for life, remainder to such persons and for such uses as he by deed, will, or codicil to be properly attested, should appoint; and for default of such appointment, to *C.* for life, remainder to *D.* for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he

confirmed

confirmed his said will in all respects not thereby altered; and after making some alterations in respect of other property, he declared such codicil to be part of his said will.

Held that *C.* and *D.* took nothing under the will and codicil of *A.* in the property which had belonged to Dr. *G*: for it did not appear that *A.* intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of Dr. *G.*: and his confirmation of his will by his codicil could not carry it further.

But even if he had intended to exercise a devising power by the will, according to the estates carved out by Dr. *G.*'s will for *C.* and *D.*, yet he afterwards altered that intent, and took a new estate in the premises, by suffering a recovery, the uses of which were different from those of Dr. *G.*'s will; reserving to himself a power of appointment by deed, will, or codicil: and when he executed a codicil afterwards, confirming his will in all respects, except where altered or revoked by his codicil, and then made specific alterations as to other parts of his property, without reference to his power, or to the property in question, (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party meant to execute it) nothing appeared to shew that he meant to execute the power by his codicil confirming his will generally, supposing it could take effect through the medium of such a will. *Lane* v. *Wilkins*, *M.* 49 *G.* 3. 241

2. One devises all his freehold estate to his wife during her natural life "and also at her disposal afterwards "to *leave* it to whom she pleases:" held that this only gave her a power to *leave* it *by will*; and therefore that a disposition of it by feoffment in her life-time was void. *Doe* v. *Thorley*, *H.* 49 *G.* 3. 438

3. Under a devise to the testatrix's daughter *E.* for life, remainder to her children and their heirs for ever; but in case *E.* die without leaving any issue of her body, then to certain other grandchildren, by other daughters, equally to be divided between them, share and share alike, as tenants in common; but in case of the death of either of her grandchildren, *under age, and without leaving any issue*, the share of him or her so dying should be for the benefit of the survivors of the respective family, &c. Held that the grandchildren took a fee in their respective shares, by reason of the devise over on their dying *under age*; with an executory devise over, if any of them died under 21, and without leaving issue *at the time of their respective deaths*; and therefore the limitation over was not too remote. *Toovey* v. *Bassett*, *H.* 49 *G.* 3. 460

4. Under a devise to *H.* of certain tenements by name for her life; provided that if *S.* and *A.* (to whom and to whose children the reversion and inheritance of the premises were intended if *H.* should die without issue) should give *H.* 1000*l.* for her life estate, then the testator devised all and singular the said estate and premises called, &c. to *S.* and *A.* for their lives, share and share alike; and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common, &c. provided that if *H.* should *die in possession of the premises* single and without issue, then he gave the said estate and premises *to S. and A. and to the issue of their bodies lawfully begotten, or to be begotten, and their heirs, as tenants in common*, AS AFORESAID; held that the words *as aforeaid* drew down to the second clause the limitations of the first, and shewed that the testator meant that *S.* and *A.* and their children should take the same estates on *H.* dying in possession without issue, as they would have done if the 1000*l.* had been paid. And held also, that a younger child of *A.* born after the death of the testator, and before the death of *H.* and *S.* (who died without issue) was entitled to share in the moieties both of *S.* and of *A.*; and that the eldest son of *A.* was also entitled to share in both moieties, though he died before *A.*; and on his death the share in S.'s moiety descended immediately to his next brother and heir at law, as did also his share in *A.*'s moiety, on her death after him. *Mercdith* v. *Meredith*, *H.* 49 *G.* 3. 503

5. Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock; including, as to six of the estates, 3 several lives in succession on each estate; and as to the seventh, (which in the first instance was only limited to two persons for life in succession,) giving those two a power "to add another life or lives to make three, in like manner, as after-mentioned for other persons to do the same; and then giving this general power, "that *when and so often* as "the lives on either of the estates "before given shall be *by death reduced to two*, that then it shall be "in the power of the person or persons then enjoying the said estate "or estates to *renew* the same with "the person or persons to whom the "revenue thereof shall belong, by "adding a third life in such estate, "and paying such reversioner two "years' purchase for such renewal; "and also to *exchange* either of the "said two lives, on payment of one "year's purchase:" held that the power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe dem. Hardwicke* v. *Hardwicke*, H. 49 G. 3. 549

DILAPIDATIONS.

See MORTMAIN, 1.

EAST INDIA COMPANY.

See CHARTER-PARTY, 1.

EJECTMENT.

See LANDLORD AND TENANT.

1. One having good title to the possession of a copyhold, as tenant by the curtesy, by the custom of the manor; his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death, though more than 20 years after the death of the wife. *Doe dem. Sir Wm. Milner, Bart.* v. *Brightwen*, H. 49 G. 3. 583

2. And though 1-3d of the copyhold had been settled many years before upon a third person for life: but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seized and admitted; and the steward of the manor appointed by the heir at law and her husband had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime) for above 20 years back, debited himself with the receipt of 2-3ds of the rent for the husband on account of his wife, and the remaining 1-3d for such person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole; so as to do away the notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-3ds as tenant by the curtesy after the wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. *Doe dem. Sir Wm. Milner, Bart.* v. *Brightwen*, H. 49 G. 3. 583

EMANCIPATION.

See SETTLEMENT—*By Hiring and Service*, 1.

EMBARGO.

See FREIGHT, 7. INSURANCE, 3.

ENROLMENT.

See MORTMAIN 1.

ENTRIES.

See EVIDENCE, 1, 2.

ERROR.

See COSTS, 1. INTEREST, 1.

EVIDENCE.

See NEWSPAPER.

1. If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact, as between third persons, after his death, if he could have been examined, to it in his lifetime; and therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. *Higham* v. *Ridgway*, *T.* 48 *G.* 3. 109

2. Upon a question whether certain ancient books, from 1586 to 1693, preserved in the archives of the dean and chapter of *Exeter*, intitled *Rentals*, and containing columns of the names of their estates, with the rents reserved on each, and *solvits* written in different hand writing against such rents, were entries made by the receivers of the dean and chapter, charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receiver's books, by shewing that the receivers of the dean and chapter for the last sixty years had kept their books of accounts in the same form.

But it appearing that some of the entries in such books, (though not the entries as to the rent of the estate in question) contained internal evidence of their being the books of receivers; by such entries as "solvit *mihi*;" and "solvit *per me*," signed with the initials N. W.; which entries imported that N. W. was therein accounting to the dean and chapter for money paid to himself, and with the receipt of which he debited himself; the Court directed a new trial, in order to have the inspection of the books again submitted to the Judge at nisi prius. *Doe d. Webber* v. *Lord Thynne*, *T.* 48 *G.* 3. 206

3. An allegation in a declaration that one was seised of a *manor* of *F.* and that he and all those whose estate he has in the *said manor* have immemorially appointed a sexton of the parish of *F.*, is sustained by proof of his seisin of a *quondam manor*, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Soane* v. *Ireland*, *M.* 49 *G.* 3. 259

4. Where the corporation of *Worcester* had for above 40 years received toll upon corn sold in their market *by sample*, and afterwards brought within the city, to be delivered to the buyer; and for about sixty years back, as far as living memory went, when corn pitched in the market-place on one market-day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market *by sample*, and *afterwards* brought into the city to be delivered to the buyer; though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market, in the manner now practiced, between 40 and 50 years ago. *Hill* v. *Smith*, *H.* 49 *G.* 3. 476

EXECUTION.

See SHERIFF, 1.

1. Kensington palace being kept in a constant state of preparation to receive the king, with his officers, servants, and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff, for the purpose of executing process against the goods of a person having the use of certain apartments therein. *Winter* v. *Miles*, *H.* 49 *G.* 3. 578

EXECUTOR.

See ADMINISTRATOR AND EXECUTOR.

FREIGHT.

1. A covenant in a charter-party of affreightment,

affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vender by a bill of sale of the ship, made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Splidt*, v. *Bowles*, *M.* 49 *G.* 3. 279

2. Where the master and freighter of a vessel of 400 tons mutually agreed in writing, that the ship being every way fitted for the voyage, should with all convenient speed proceed to *St. Petersburgh*, and there load from the freighter's factors a *complete* cargo of hemp and iron, and proceed therewith to *London*, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c.; one half to be paid on right delivery, the other at three months: held that the delivery of a *complete* cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. *Ritchie* v. *Atkinson*, *M.* 49 *G.* 3. 295

3. The master and the freighter of a vessel of 400 tons, having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to *St. Petersburgh*, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same, on being paid freight, &c.: held that the master, after the taking in at *St. Petersburgh*, about half a cargo having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted bonâ fide, and under a reasonable and well-grounded apprehension at the time; and a hostile seizure under an embargo was in fact made six weeks afterwards. *Atkinson* v. *Ritchie*, *H.* 49 *G.* 3. 530

4. Where in a charter-party freight was to be paid at so much per ton, *on a right and true delivery of the homeward bound cargo*, from *Honduras Bay* to *London*, and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which she was carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there on the application of the master, acting bonâ fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship-owners: held that the freighter might recover such proceeds in assumpsit for money had and received, without allowing freight pro ratâ itineris. For such form of action, for the proceeds of an illegal sale of goods, is only a waver of any claim for *damages* for the tortious act: taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt; which admits of a set off. &c.) but does not recognize the right of the vendor so to convert the goods. And here the act of conversation, (for such it must be taken to be) being made by the master, who is the general agent of the ship-owners; (and not, as in *Bailie* v. *Modigliani*, by the act of a Court of competent jurisdiction:) was unlawful, and discharged the claim of the ship-owners for freight pro ratâ itineris. *Hunter* v. *Princep*. *M.* 49 *G.* 3. 378

5. But the plaintiff could not recover against the ship-owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. *ib.*

6. The 14*l.* covenanted to be paid by the East India Company in their charter-parties, to the ship-owner *in England*, for each passenger ordered on board the ship in *India* by the Company's Agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames*. *Moffat* v. *The East Company*, *H.* 49 *G.* 3. (And *vide* CHARTER-PARTY, 1.) 468

7. Under an agreement in the nature of a charter-party, whereby the plaintiff let

let his ship on freight to the defendants on a voyage from *Shields* to *Lisbon*, with convoy, *the freight to be paid on right delivery of the cargo*, the ship having sailed from *Shields* with her cargo, and joined convoy at *Portsmouth*; and after being detained near a month off *Lymington*, her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants having refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant and then was sold by consent of both parties, without prejudice; held that the plaintiff could not recover freight pro ratâ, or demurrage. *Liddard* v. *Lopes*, *H.* 49 *G.* 3 526

8. A covenant in a charter-party of affreightment that the owner shall, at his expence *forthwith* make the ship tight and strong, &c. for a voyage for 12 months, &c. and *keep* her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service, and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owners' neglect to repair in the first instance had precluded the freighter from making *any* use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock* v. *Geddes* *H.* 49 *G.* 3. 555

9. A ship having been let to freight for 12 months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10 and 14 months, &c.; it is no answer to a breach for non-payment of six months' freight, due at the end of the 10 months, that the owner had covenanted to *keep* the vessel *in repair* during the time she was freighted, and that she was not in repair *when* the freighter *shipped goods* on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months; and that he had paid the freight for all the time she was serviceable: and that she was not in his service for 10 months in the whole; for non constat but that after she had been used by the freighter, she wanted repair, without any default of the owner: or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. *Havelock* v. *Geddes*, *H.* 49 *G.* 3. 555

10. The freight being reserved at so much *per month*, was earned at the end of each month, although the stipulated times of payment were from four months to four months (beginning at the end of two months) and the ship were lost before the end of 14 months. *ib.*

GAME.

1. The possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not *a possession* within the penalty of the game laws. *Warneford* v. *Kendall*, *T.* 48 *G.* 3. 19

2. In debt for a penalty, under the game laws, if the defendant shew a deputation as game-keeper of the manor from the lord, it may be presumed, if nothing appear to the contrary, that the game killed by him there was for the use of the lord under the stat. 3. *G.* 1. *c.* 11. *Spurrier* v. *Vale*, *H.* 49 *G.* 3. 413

GUARDIAN IN SOCAGE.

A guardian in socage, residing on the Ward's estate for 40 days, gains a settlement in the parish and cannot be removed from the possession of it at any time. *The King* v. *The Inhabitants of Oakley*, *H.* 49 *G.* 3. 491

HORSES.

See TURNPIKE, 1.

INDEMNITY ACT.

See CORPORATION, 1.

INDICTMENT.

One indicted for a misdemeanor may plead in abatement a misnomer of his surname, *Shakepear* for *Shakepeare*, which shall not be taken for idem sonans; and the plea, concluding *praying judgment of the said indictment, and that he may not be compelled to answer the same*, is good. *The King* v. *Shakespeare*, *T.* 48 *G.* 3. 83

INHABITANCY.

Freemen of *Norwich*, substitutes in the militia, quartered at *Colchester*, but having dwelling houses in *Norwich*, in which their families resided, and to which they at times resorted on furlough, (in some instances within the last six months, only for the purpose of voting at elections,) held to be *inhabitants* within the charter of *Norwich*, and a local act requiring them to have been *inhabitants for six calendar* months previous to certain elections of corporate officers, in order to qualify them to vote. *The King* v. *Mitchell*, *H.* 49 *G.* 3. 511

INSOLVENT DEBTORS.

One in custody by attachment for non-payment of money under 20*l.* found due by an award made a rule of court, is not entitled to his discharge under the stat. 48 *G.* 3. *c.* 123.; that being confined to persons in execution upon any judgment. *The King* v. *Hubbard*, *M.* 49 *G.* 3. 408

INSURANCE.

1. A ship insured from *Jamaica* to *Liverpool* was captured in the course of her voyage, and recaptured in a few days; and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment: and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in *Ireland*, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession without damage, and arrived at Liverpool, and earned her freight: the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent.: held that he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed; and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss. And quære, whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss.

The like point was ruled on the freight policy, on which there was a partial loss of 13*l.* 11*s.* 5*d.* per cent.

But at any rate if the underwriters accept the offer of abandonment, made upon such temporary total loss, both parties are bound by it. *Bainbridge* v. *Neilson*, *M.* 49 *G.* 3. 329

2. A representation to the underwriters at the time of effecting a policy by the owner of *goods* on board a ship, as to the time of her sailing, being made bonâ fide upon probable expectation, does not conclude him. *Bowden* v. *Vaughan*, *Hil.* 49 *G.* 3. 415

3. A foreigner insuring in this country his ship or goods on a voyage is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act. And goods having been consigned by such foreigner on his own account and risk to *British* merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance upon the goods on his account, debiting him with the premiums; and the goods were afterwards abandoned in consequence of such embargo: held that as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear; however they might have insured their separate interest by a policy made on their own account. *Conway and Davidson* v. *Grey*, *H.* 49 *G.* 3. 336

INTEREST.

An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 *H.* 7. *c.* 10. which is confined to judgments recovered by plaintiffs below, and affirmed on a writ of error. *Golding* v. *Dias*, *T.* 48 *G.* 3. 2

JOINDER IN ACTION.

See PLEADING, 10, 12, 16.

JUDGMENT.

Upon a plea in abatement the court give no other than the proper judgment prayed for by the party; but upon a plea in bar, the court will give that which appears to them to be the proper judgment upon the whole record, whether regularly prayed for or not. *The King* v. *Shakespeare*. *T.* 48 *G.* 3. 87

JUDGMENT IN ERROR.

See COSTS, 1. INTEREST, 1.

KENSINGTON PALACE.

See PALACE.

LADING, BILL OF.

See BILL OF LADING.

LANDLORD AND TENANT.

1. A landlord of premises about to sell them gave his tenant notice to quit on the 11th of October 1806, but promised not to turn him out unless they were sold: and not being sold till February 1807, the tenant refused on demand to deliver up possession. And on ejectment brought, held that the promise (which was performed) was no waver of the notice, nor operated as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit. *Whiteacre, d. Boult* v. *Symonds*, *T.* 48 *G.* 3. 13

2. A landlord declared in debt, 1st, for the double value; 2dly, for use and occupation. The tenant pleaded nil debet to the first, and a tender of the single rent before the action brought to the second count, and paid the money into Court; which the plaintiff took out before trial and still proceeded: and held that this was no cause of nonsuit, as upon the ground of such acceptance of the single rent being a waver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury; and that the plaintiff's going on with the action after taking the single rent out of court, was evidence to shew that he did not mean to wave his claim for the double value, but to take it pro tanto. And it seems, that though the single rent were paid into court on the second count, yet if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so paid in deducted out of the larger sum recovered. *Ryall* v. *Rich*. *T.* 48 *G.* 3. 48

3. In a lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, &c. *and assigns*, not to have persons to work in the mill who were settled in other parishes, without a parish certificate: held that this covenant did not run with the land, or bind the assignee of the lessee. *The Mayor &c. of Congleton* v. *Pattison*, *T.* 48 *G.* 3. 130

4. In covenant on an indenture of demise of a coal mine, made on the 8th of *July* 1805, reserving one-fourth of the coal raised, or the value in money, at the election of the lessor; and if the one-fourth fell short of 400*l.* per annum, then reserving such additional rent as would make up that *annual* sum, to be rendered *monthly* in equal portions; held that the lessor having elected to take the whole in money may declare for two years and three months' rent in arrear. But even if the money rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the one-fourth or the value in money, &c. but had refused, &c.: held that it would not hurt on *general* demurrer, that the count went on to allege, that before the exhibition of the plaintiff's bill, *viz. on the* 1*st of November* 1797, 900*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible

in respect to the subject-matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill, 900*l.* of the rent reserved, &c. was due, is sufficient.—*Buckley* v *Kenyon*, *T.* 43 *G.* 3. 139

5 An estate, the greater part of which was in lease, either for years certain not exceeding 21, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the free-"hold of the premises or any part "thereof, when he should be in the "actual possession of the same, or "any part thereof, from time to time, "by indenture to make leases of all "or any part or parts of the demesne "lands, whereof he should be in the "actual possession as aforesaid, for "any term or number of years, not "exceeding 21 years, or for the life "or lives of any one, two, or three "person or persons: *so as* no greater "estate than for three lives be at any "one time in being in any part of "the premises; and so as the an-"cient yearly rent, &c. be reserved." Held 1st, that the power only authorized either a chattel lease, not exceeding 21 years, or a freehold lease not exceeding three lives; and that a lease by tenant for life for 99 years determinable on lives, as it might exceed 21 years, was void at law, and was not even good pro tanto for the 21 years. *Roe d. Brune* v. *Prideaux*, *T.* 48 *G.* 3. 158

6. But the special verdict finding that the tenant in tail had received the rent reserved by such lease accruing after the death of the tenant for life who made it, and who had not given any notice to quit: held, 2dly, that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; and for the defect of the special verdict in this respect a venire de novo was awarded. But the Court intimated, that under the circumstances of the case, and the disparity of the rent reserved, being 4*l.* 2*s.* while the rack-rent value was 60*l.* a-year; (though one of the lessees had been presented by the homage as tenant after the death of the tenant for life, and admitted by the lord's steward; and the 4*l.* 2*s.* reserved was more than the ancient rent;) a jury would be strongly advised to decide against a tenancy from year to year. *Roe d. Brune* v. *Prideaux*, *T.* 48 *G.* 3. 158

7. Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession under a void lease granted by tenant for life under a power, the rack rent value of which was 30*l.* a year, cannot maintain an ejectment, (laying his demise, at least, on a prior day), without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice. *Denn* v. *Rawlins*, *M.* 49 *G.* 3. 261

8. A lease at 43*l.* a year, granted under a power directing the *best* rent to be reserved, cannot be impeached merely by shewing that the lessor rejected at the time two specific offers, one of 50*l.* and another from 50*l.* to 60*l.* from other tenants; though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered; unless something extravagantly wrong in the bargain for rent be shewn. Semble that the *best* rent means the best rack-rent that can *reasonably* be required by a landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account. *Doe* v. *Radcliffe*, *M.* 49 *G* 3. 278

9. A lessee of land in the *Bedford Level* cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 *Car.* 2 *c.* 17. for want of being registered; such act enacting, "that no lease, &c. should be of force "but from the time it should be re-"gistered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before. *Hodson* v. *Sharpe*, *M.* 49 *G.* 3. 350

10. Under

10. Under a power to demise for 21 years in possession, and not in reversion, a lease dated in fact on the 17th of *February* 1802, habendum from the 25th of *March next ensuing the date thereof*, is good, if not executed and delivered till *after* the 25th of *March*; for it *then* takes effect as a lease in possession with reference back to the date actually expressed. *Doe* v. *Day, H.* 49 *G.* 3. 427

LEASE.

See LANDLORD AND TENANT. POWER, 1, 2, 3, 5.

LIBEL.

An affidavit made and signed by the printer and publisher and proprietor of a newspaper, as required by stat. 38 *G.* 3. *c.* 78. which affidavit contained the names of the parties, the place where the paper was printed, and the title of it; together with the production of a newspaper, tallying in every respect with the description of it in the affidavit; is not only evidence by that act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be: and this, upon the trial of an information for a libel contained in such newspaper. *The King* v. *Hart and White, T.* 48 *G.* 3. 94

MANDAMUS.

See APPEAL, 1. COPYHOLD, 2.

MALT.

See CONVICTION.

MANOR.

1. An allegation in a declaration that one was seised of a *manor* of F., and that he and all those whose estates he has in the *said manor* have immemorially appointed a sexton of the parish of F., is sustained by proof of his seisin of a *quondam manor*, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Soane* v. *Ireland, M.* 49 *G.* 3. 259

2. Though the lord of a manor in Cornwall may by conveyance and acts of ownership establish his right to all his mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than twenty years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands within the vill. *Curtis* v. *Daniel, M.* 49 *G.* 3. 273

MARRIAGE.

1. A wagering contract for fifty guineas, that the plaintiff would not marry within six years, is primâ facie in restraint of marriage, and therefore void: no circumstances appearing to shew that such restraint was prudent and proper in the particular instance. *Hartley* v. *Rice, T.* 48 *G.* 3. 22

2. Evidence that *British* subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk; which service the parties understood to be the marriage service of the church of *England*; and they received a certificate of the marriage, which was afterwards lost; is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man and wife, till the period of the husband's death.

And such *British* subjects being attached at the time to the British army on service in such foreign country, and having military possession of the place; it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England*, as a marriage contract per verba de præsenti before the marriage act: marriages beyond

beyond sea being excepted out of that act; and it would make no difference if solemnized by a Roman catholic priest. *The King* v. *The Inhabitants of Brampton, M.* 49 *G.* 3. 282

MARKET TOLL.

Where the corporation of *Worcester* had for above forty years received toll upon corn sold in their market *by sample* and *afterwards* brought within the city to be delivered to the buyer; and for about sixty years back, as far as living memory went, when corn pitched in the market place on one market day was not then sold, it was usually put in store in the city, and only one bag brought into the next market by way of sample, and when sold in that manner toll used to be taken on the whole; this was held sufficient evidence to be left to the jury of a prescriptive claim to take toll on corn sold in the market *by sample*, and *afterwards* brought into the city to be delivered to the buyer; though the witnesses spoke according to their recollection and belief of the commencement of selling by sample in the market, in the manner now practised, between forty and fifty years ago. *Hill* v. *Smith, H.* 49 *G.* 3. 476

MINES.

See COVENANT, 2.

1. The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within the manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing. *Bourne* v. *Taylor, T.* 48 *G.* 3. 189
2. But where the defendant justified under the lord, as being seized in fee of the veins of coal lying under the copyhold tenements, *together with the liberty of boring for and getting the coal*, &c. it is not enough for the plaintiff to reply, that as well as the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse *the liberty* of working the mines; because the plea claims such liberty not merely as annexed to the seisin in fee, to be exercised when in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it, *Bourne* v. *Taylor, T.* 48 *G.* 3. 189
3. Though the lord of a manor in *Cornwall* may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet consistently therewith the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may by acts of ownership for more than twenty years past establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands within the vill. *Curtis* v. *Daniel, M.* 49 *G.* 3. 273

MORTMAIN.

Where successive rectors had been in possession of land for above fifty years past; but in an action for dilapidations brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 *G.* 2. *c.* 36. and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the fourth section; held that no presumption could be made of any such conveyance enrolled, (which if it existed the party might have shewn,) and consequently that the rector had no title to the land: as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed; although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in *Baliol* college,

college, *Oxford*. *Wright* v. *Smithies*, *H.* 49 *G.* 3, 409

NEWSPAPER—EVIDENCE OF PUBLICATION.

An affidavit made and signed by the printer and publisher and proprietor of a newspaper as required by stat. 38 *G.* 3. *c.* 78, which affidavit contained the names of the parties, the place where the paper was printed, and the title of it; together with the production of a newspaper, tallying in every respect with the description of it in the affidavit; is not only evidence by that act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be: and this upon the trial of an information for a libel contained in such newspaper. *The King* v. *Hart and White*, *T.* 48 *G.* 3. 94

NEW TRIAL.

The Court will not grant a new trial in a penal action where the verdict has passed for the defendant, on the ground of its being against the evidence. *Brook qui tam* v. *Middleton*, *M.* 49 *G.* 3. 268

NONSUIT.

See PLEADING, 14. or PRACTICE, 18.

NOTICE TO QUIT.

See LANDLORD AND TENANT. 1. 6, 7.

OCCUPATION,

See POOR'S RATE, 2.

PALACE.

Kensington Palace being kept in a constant state of preparation to receive the King, with his officers, servants, and guards, residing and doing duty there at all times, and some of the Royal Family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of certain apartments therein. *Winter* v. *Miles*, *H.* 49 *G.* 3. 578

PARISHIONER.

See WITNESS, 1, 2.

PARTNER.

1. The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. *Lord Viscount Gallway* v. *Mathew and Another*, *M.* 49 *G.* 3. 264
2. Two of three partners, affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and then the two partners having in the meantime committed acts of bankruptcy indorsed such bill to the creditor of the firm in part satisfaction of his debt; and afterwards separate commissions were sued out against the two partners, who were declared bankrupts and their effects assigned; the other partner being all the time abroad. Held, 1st, that by such indorsement of the bill by the two, after acts of bankruptcy committed by them though before the commissions issued, nothing passed to the creditor; for the bankrupt partners had by relation ceased at the time of such indorsement to have any control over the joint

joint stock as partners, and therefore could not bind either the property of the assignees or of their solvent partner. 2dly, That the solvent partner might join with the assignees of the other two in maintaining an action for money had and received, to recover back from the creditor the amount of the bill received by him from the acceptor. 3dly, That such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs. *Thomason jointly with Hipgip and others, assignees of Underhill, and Guest* v. *Frere, H.* 49 *G.* 3. 418

PAYMENT OF MONEY INTO COURT.

See LANDLORD AND TENANT, 2.

PENAL ACTION.

The Court will not grant a new trial in a penal action where the verdict has passed for the defendant, on the ground of its being against the evidence. *Brook, qui tam* v. *Middleton, M.* 49 *G.* 3. 268

PLEADING,

See JUDGMENT.

1. A defendant in trespass cannot plead by way of justification, that he was possessed of a right of common over the locus in quo under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in Court, of which *the date and names of the parties are unknown. Hendy* v. *Stephenson, T.* 48 *G.* 3. 55
2. A new assignee of a bankrupt, suing in debt on a judgment recovered by a former assignee displaced by the Lord Chancellor may declare in a general form as having been *duly* constituted and appointed assignee. *De Cosson* v. *Vaughan*, in error. *T.* 48 *G.* 3. 61
3. Where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in the several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification and also newly assign either the same or different matters; such replication and new assignment being double. *Cheasley* v. *Barnes* and others, *T.* 48 *G.* 3. 73
4. And the objection is sufficiently pointed at by assigning as special cause of demurrer, that each plea containing a distinct justification to the *single* act of trespass alleged in breaking and entering the plaintiff's close in the first count, &c. the plaintiff had by his replications *and new assignment* attempted to put in issue several distinct acts of trespass in breaking and entering the same close, &c. *ib.*
5. A sheriff justifying in trespass under a writ of fieri facias, need not shew its return; the distinction being in this respect between a justification under mesne process, and under process in execution; at least where in the latter case no ulterior process is necessary to complete the justification. *ib.*
6. One indicted for a misdemeanor may plead in abatement a misnomer of his surname *Shakepeare* for *Shakespeare;* which shall not be taken for idem sonans; and the plea concluding with *praying judgment of the said indictment, and that he may not be compelled to answer the same,* is good. *Rex* v. *Shakespeare, T.* 48 *G.* 3. 83
7. In covenant on an indenture of demise of a coal mine, made on the 8th of July 1805, reserving 1-4th of the coal raised or the value in money, at the election of the lessor; and if the 1-4th fell short of 400*l.* per annum, then reserving such additional rent as would make up that *annual* sum, to be rendered *monthly* in equal portions; held that the lessor having elected to take the whole in money, may declare for two years and three months rent in arrear. But even if the money-rent were reserved annually, the plaintiff may remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the 1-4th or the value in money, &c. but had refused, &c.; held that it would not hurt on *general* demurrer, that the count went on to allege,

allege, that before the exhibiting of the plaintiff's bill, *viz. on the first of November* 1797, 900*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject-matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill, 900*l.* of the rent reserved, &c. was due, is sufficient. *Buckley* v. *Kenyon*, *T.* 48 *G.* 3. 139

8. Where a defendant, in trespass for breaking and entering a copyhold close, justified under the lord, as being seized in fee of the veins of coal lying under the copyhold tenements, *together with the liberty of boring for and getting the coal*, &c. it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c, without any exception or reservation of the coal, &c. unless he also traverse the *liberty* of working the mines; because the plea claims such liberty, not merely as annexed to the seisin in fee, to be exercised in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it. *Bourne* v. *Taylor*, *T.* 48 *G.* 3. 189

9. Where a sham plea was pleaded of judgments recovered in the court of Pie-poudre in *Bartholomew* fair, in terms palbably fictitious and out of the regular course, the Court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. *Blewitt* v. *Marsden*, *T.* 48 *G.* 3. 237

10. To a count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors and assigns, may be joined another count, charging them that after the testator's death and their proving the will, and during the term, the demised premises came by assignment to one D. A. against whom breaches were alleged; and concluding that so neither the testator nor the defendants after his death, nor D. A. since the assignment to him, had kept the said covenant, but had broken the same. And plene administraverunt may be pleaded to both counts. *Wilson* v. *Wigg*, *M.* 49 *G.* 3. 313

11. It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead plene administravit of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading plene administravit by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any devastavit by the first executor could be made good. *Wells* v. *Fydell*, *M.* 49 *G.* 3. 315

12. A plea of tender to one count, and a plea of alien enemy to another, cannot be pleaded together. *Shombeck* v. *De la Cour*, *M.* 49 *G.* 3. 326

13. After a writ sued out, and common bail filed, against a defendant by the name of J., it is irregular for the plaintiff to declare against him by the name of R., sued by the name of J. (he not having then appeared) and the defendant may set aside the proceedings before plea. *Delaney* v. *Cannon*, *M.* 49 *G.* 3. 328

14. Where a request to the defendant to do an act is necessary to be alleged in order to give the plaintiff his cause of action; and it is alleged, but without a particular venue, (there being a general venue laid in the preceding part of the declaration); such omission cannot be taken advantage of in arrest of judgment since the stat. 4 *Ann. c.* 16. *s* 1. being mere matter of form, available only upon special demurrer: and this though judgment passed by default, on which a writ of enquiry was executed. And where, in consideration of the purchase of hay by the

the plaintiff of the defendant, the latter promised to deliver to and suffer the plaintiff to take it away as he wanted it, when requested; an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, supersedes the necessity of alleging a request to deliver, &c. the residue. *Bowdel* v. *Parsons*, *M.* 49 *G.* 3. 359

15. After judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined. *Paxton* v. *Popham*, *M.* 49 *G.* 3. 566

16. A solvent partner may join with the assignees of his two bankrupt partners in maintaining an action for money had and received to recover back from a creditor the amount of a bill, the joint property of the firm received by him from the acceptor by the indorsement of the two other partners after acts of bankruptcy committed by them. *Thomason, jointly with Hipgip and others, assignees of Underhill and Guest*, v. *Frere*, *H.* 49 *G.* 3. 418

POOR'S RATE.

1. *Saleable underwoods* are rateable annually to the relief of the poor, within the construction of the stat. 43 *Eliz.* *c.* 2. in proportion to their value, though they should happen not to be cut down more than once in 21 years; and their annual value may be estimated amongst other ways according to the value they may be worth to rent for a lease of the duration of their intended growth. *The King* v. *The Inhabitants of Mirfield*, *T.* 48 *G.* 3. 219

2. One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual, is liable to be rated to the relief of the poor, as occupier of the whole house. *The King* v. *The Inhabitants of Aberystwith*, *M.* 49 *G.* 3. 354

3. Beech being admitted to be timber by the custom of the county of Bucks, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years growth; and therefore upon an issue, whether certain beech trees in that county, (which after being felled had been distrained for payment of a poor's rate, to which it was contended that they were liable,) were or were not *timber*, according to the custom of the county, the inquiry is confined to the nature of the wood, and the period of its growth, whether of twenty years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood. And the jury having found a general verdict for the plaintiff on that issue, affirming such trees of twenty years growth and upwards, though not containing ten feet of solid wood, to be *timber* by the custom; and also upon another issue, negativing them to be *saleable underwood* within the stat. 43 *Eliz.* *c.* 2.; the Court refused to grant a new trial. *Aubrey* v. *Fisher*, *H.* 49 *G.* 3. 446

POOR-REMOVAL.

See SETTLEMENT.

A labourer employed by his master to drive a cart into his parish with one load, and to return with another, and who broke his leg there by accident, which detained him for some time in such parish, by which he was relieved, is to be considered as *casual poor*, and as such is not removeable either under the stat. 13 and 14 *Car.* 2. *c.* 12, or the stat. 35 *G.* 3. *c.* 101, as not coming there *to settle* or *inhabit*; and consequently the expences of his relief cannot be directed to be paid during the suspension of the order of removal under the latter statute. *Rex* v. *The Inhabitants of St. James's in Bury St. Edmonds*, *T.* 48 *G.* 3. 25

The same point was ruled in *The King* v. *The Inhabitants of Thatcham*, *M.* 49 *G.* 3. in a case nearly alike in circumstances.

POSSESSION.

1. Where successive rectors had been in possession of land for above 50 years past; but in an action for dilapidations, brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 *G.* 2. *c.* 36, and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the 4th section; held that no presumption could be made of any such conveyance enrolled, (which if it existed, the party might have shewn;) and consequently that the rector had no title to the land; as the statute avoids all other grants, &c. in trust for any charitable use, made otherwise than is thereby directed; although in fact it appeared that one of these devisees was the then rector, and that the title to the rectory was in *Baliol College, Oxford. Wright* v. *Smythies, H.* 49 *G.* 3. 409

2. One having good title to the possession of a copyhold as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title: though he were admitted after his wife's death to hold to him pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment, brought within 20 years after the husband's death. *Doe dem. Sir William Milner, Bart.* v. *Brightwen, H.* 49 *G.* 3. 583

And though 1-3d of the copyhold had been settled many years before upon a third person for life, but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted; and the steward of the manor appointed by the heir at law and her husband, had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime) for above 20 years back, debited himself with the receipt of a 2-3ds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole, so as to do away the notion of an adverse possession by the husband of that one-third, distinct from his possession of the other 2-3ds as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband, who set up an adverse possession for above 20 years after the wife's death. *Doe dem. Sir William Milner, Bart.* v. *Brightwen, H.* 49 *G.* 3. 583

POWER.

See LANDLORD AND TENANT.

1. An estate, the greater part of which was in lease, either for years certain not exceeding 21, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part thereof, when he should be in the actual possession of the same, or any part thereof from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding 21 years, or for the life or lives of any 1, 2, or 3 person or persons; *so as* no greater estate than for three lives be at any one time in being in any part of the premises, and so as the ancient yearly rent, &c. be reserved." Held, 1st. that the power only authorized either a chattel lease, not exceeding 21 years, or a freehold lease not exceeding three lives: and that a lease by tenant for life for 99 years, determinable on lives, as it might exceed 21 years was void at law, and was not even good pro tanto for the 21 years. *Roe d. Brune* v. *Prideaux, T.* 48 G. 3. 158

2. A lease at 43*l.* a-year, granted under a power directing the *best* rent to be reserved, cannot be impeached merely shewing that the lessor rejected two specific offers one of 50*l.* and another from 50*l.* to 60*l.* from other tenants, though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no

fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded, as well as the mere amount of the rent offered, unless something extravagantly wrong in the bargain for rent be shewn. Semble that the *best* rent means the best rack rent that can *reasonably* be required by a landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account. *Doe* v. *Radcliffe*, *M.* 49 G. 3. 278

3. Under a power to demise for 21 years in possession, and not in reversion, a lease dated in fact on the 17th of *February* 1802, habendum from the 25th of *March next ensuing the date thereof*, is good, if not executed and delivered *after* the 25th of *March*; for it *then* takes the effect as a lease in possession with reference back to the date actually expressed. *Doe* v. *Day*, *H.* 49 *G.* 3. 427

4. One devises all his freehold estate to his wife during her natural life, " and also at her disposal afterwards to *leave* it to whom she pleases;" held that this only gave her a power to *leave* it *by will*, and therefore that a disposition of it by feoffment in her life-time was void, *Doe* v. *Thorley*, *H.* 49 *G.* 3. 438

5. Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock, including, as to six of the estates, three several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power to " add another life or lives, to make 3, in like manner, as after mentioned, for other persons to do the same;" and then giving this general power, " that *when and so often* as the " lives on either of the estates before " given shall be *by death reduced to* " *two*, that then it shall be in the " power of the person or persons then " enjoying the said estate or estates " to *renew* the same with the person " or persons to whom the revenue " thereof shall belong, by adding a " third life to such estate, and paying " such reversioner two years' purchase " for such renewal, and also to *ex-* " *change* either of the said two lives, " on payment of one year's purchase;" held that this power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe dem. Hardwicke* v. *Hardwicke*, *H.* 49 *G.* 3. 549

1. No cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury be served, and the cause marked in the marshal's book as a special jury, on or before the day preceding the adjournment day in *Middlesex* and *London* respectively. *Regula Generalis*, *H.* 44 *G.* 3. 1

2. An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 *H.* 7. *c.* 10, which is confined to judgments recovered by *plaintiffs* below, and affirmed on a writ of error. Neither is such defendant in error entitled to his costs on the statute 8 & 9 *W.* 3. *c.* 11. *s.* 2. which is confined to judgments for defendants on demurrer. *Golding* v. *Dias*, *T.* 48 *G.* 3. 2

3. The venue may be changed in an action for criminal conversation on the usual affidavit, that *the whole cause of action*, if any, arose in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife: and the venue can only be brought back by the plaintiff's undertaking to give material evidence in the original county.—*Guard* v. *Hodge*, *T.* 48 *G.* 3. 32

4. In the case of a defendant charged in execution, the committitur must be filed of the same term as the marshal's acknowledgment. *Cunningham* v. *Cogan*, *T.* 48 *G.* 3. 46

5. Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first day of term, being the return-day of the writ, and the under-sheriff signified his assent to the surrender by the return of post the next day, at the distance of seventeen miles, held sufficient to discharge the bail-bond of which the plaintiff had

had taken an assignment afterwards, with notice of such surrender.—*Plimpton* v. *Howell*, *T.* 48 *G.* 3. 100

6. Where a sham plea was pleaded of judgments recovered in the Court of Pie-Poudre in *Bartholomew* fair, in terms palpably fictitious and out of the regular course, the Court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. *Blewitt* v. *Marsden*, *T.* 48 *G.* 3. 237

7. After a writ sued out, and common bail filed, against a defendant by the name of J.; it is irregular for the plaintiff to declare against him by the name of R. sued by the name of J. (he not having then appeared) and the defendant may set aside the proceedings before plea. *Delanoy* v. *Cannon*, *M.* 49 *G.* 3. 328

8. After judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined. *Paxton* v. *Popham*, *M.* 49 *G.* 3. 366

9. A plea of ancient demesne was permitted to be filed de bene esse within the four first days, pending a rule nisi for permission to allow the plea so filed. *Doe dem Morton* v. *Roe*, *H.* 49 *G.* 3. 523

PRESCRIPTION.

See EVIDENCE, 4.

PRESUMPTION.

See POSSESSION.

PRINCE OF WALES.

See BOND, 2.

PRINCIPAL AND SURETY.

See SURETY.

PROHIBITION.

1. Prohibition granted on affidavit that the defendant (to a libel for tithes in kind in the spiritual court) *answered on oath*, or *pleaded* a modus; without its appearing that the modus was regularly pleaded below, so as to be put in issue there. *French* v. *Trask*, *M.* 49 *G.* 3. 348

2. Prohibition denied after sentence, where the party applying had permitted the question of fact, whether the land for which tithe was claimed, were natural meadow or not, *to be tried below*. *Stainbank* v. *Bradshaw*, *M.* 48 *G.* 3. 349

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PROMOTIONS.

Mr. Serjt. *Heywood* and Mr. *Balguay* made *Welch* Judges. 239

Mr. *Clarke* made King's Counsel, *ib.*

QUO WARRANTO.

1. One who has not taken the sacrament within a year, being incapable of being elected into a corporate office by stat. 13 *Car.* 2, *c.* 12. his disqualification was held not to be removed by the annual act of indemnity (47 *G.* 3. *st.* 2. *c.* 35.) the 6th section of which restrains its operation in cases where the office shall have been "already legally *filled up and enjoyed* by any other person," at the time of passing the act; the fact being, that the defendant and another were candidates at the time of the election, when 40 electors were assembled; and, after two electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative and the other candidate in the affirmative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being 20 in number, except two or three; and 16 afterwards voted for the other. Held,

1st, That all the votes given for the defendant after such notice were thrown away.

2dly, That the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes, (not being equal in number to the good votes ultimately given for the other) had voted before such notice.

3dly, That the presumption of law being

being that every person has comformed to the law till something appear to rebut that presumption, it must be taken that the other candidate who affirmed his qualification, which was not negatived by the jury, was duly qualified; and that such his election, perfected by swearing-in, was a *filling up and enjoying* by him of the office, within the proviso of the indemnity act, so as to preclude its operation by relation in favour of the defendant. *The King* v. *Hawkins, T.* 48 *G.* 3. 211

2. Freemen of *Norwich*, substitutes in the militia, quartered at *Colchester*, but having dwelling houses in *Norwich*, in which their families resided, and to which they at times resorted on furlough, (in some instances, within the last six months, only for the purpose of voting at elections;) held to be *inhabitants* within the charter of *Norwich*, and a local act requiring them to have been *inhabitants for six calendar months* previous to certain elections of corporate officers, in order to qualify them to vote. *The King* v. *Mitchell, H.* 49 *G.* 3. 511

RECTORY.

See MORTMAIN, 1.

REGISTER.

See SHIP, 1.

REGISTER *of Title.*

A lessee of land in the *Bedford* Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 *Car.* 2. *c.* 17, for want of being registered; such act, enacting that "no lease, &c. should be of force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers registering their titles before. *Hodson* v. *Sharpe, M.* 49 *G.* 3. 350

RELEASE.

No release from an heir at law to one in possession of a copyhold will be presumed during the continuance of a curtesy estate under which such tenant in possession might have defended himself, though claiming in another right. Nor will such release be presumed from the present heir, after the death of the former heir within a short period, when the present heir might be called upon in equity to discover it, if given; though such release, if proved or presumed would bar the copyholder's claim. *Doe d. Sir W. Milner, Bart.* v. *Brightwen, H.* 49 *G.* 3. 583

REMOVAL.

See APPEAL, 1.

SACRAMENT.

See CORPORATION, 1.

SALE—*by Sample.*

See MARKET TOLL.

SALEABLE UNDERWOODS.

See POOR'S RATE, 3.

SET-OFF.

A solvent partner may join with the assignees of his two bankrupt partners in maintaining an action for money had and received to recover back from a creditor the amount of a bill (part of the joint stock), received by him from the acceptor by the indorsement of the two partners after acts of bankruptcy committed by them: and such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different plaintiffs. *Thomason and Others* v. *Frere, H.* 49 *G.* 3. 418

SETTLEMENT—*by Estate.*

A guardian in socage, residing on the ward's estate for 40 days, gains a settlement in the parish, and cannot be removed from the possession of it at any time. *The King* v. *The Inhabitants of Oakley, H.* 49 *G.* 3. 491

SETTLEMENT—*by Hiring and Service.*

1. A widower having a daughter, placed her at 11 years of age with an uncle,

uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service to him, but without any contract of hiring to give her a settlement of her own; the father in the mean time having gone out to service. Held that on her coming of age, she was emancipated, although her father conceived himself bound, as such, to receive and support her if she left her uncle's: and consequently the father was capable of gaining a settlement by hiring and service for a year, as "an unmarried man, *not having a child*," (*i. e.* not having a child who would follow his settlement) within the stat. 3 *W. & M. c.* 11. *s.* 7. *The King* v. *The Inhabitants of Cowhoneyhorne, T.* 48 *G.* 3. 88

2. No settlement can be gained by serving under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends; for that is to be taken distributively; *i. e.* reserving a week out of each year. *The King* v. *The Inhabitants of Rushulme, M.* 49 *G.* 3. 325

3. Under a contract of hiring as a bleacher and crofter for a year at 12*s.* a-week, the servant continuing to work under such a contract for a year, gained a settlement in the parish where he resided, although by the practice of the manufactory in which he was engaged, if he finished his appointed week's work, calculated at so many pieces a-day for *six* days in less time, he had the rest of the week to do as he pleased, and he also went where he chose on *Sundays* without asking leave: for this is an express contract for a year, without any express exception. *The King* v. *The Inhabitants of Horwick, H.* 49 *G.* 3. 489

4. A statute fair being held yearly on the day after old *Michaelmas*, except when old *Michaelmas* falls on a *Saturday*, and then the fair being held on the *Monday;* held that a hiring from such *Monday* till old *Michaelmas* day following is not a yearly hiring under which a settlement can be obtained. *The King* v. *The Inhabitants of Standon Massey, H.* 49 *G.* 3. 576

SETTLEMENT—*by Marriage.*

Evidence that *British* subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into *English* by the officiating clerk; which service the parties understood to be the marriage service of the church of *England;* and they received a certificate of the marriage, which was afterwards lost; is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after 11 years' cohabitation as man and wife, till the period of the husband's death.

And such *British* subjects being attached at the time to the *British* army on service in such foreign country, and having military possession of the place; it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England*, as a marriage contract per verba de præsenti before the marriage act; marriages beyond sea being excepted out of that act, And it would make no difference if solemnized by a Roman Catholic priest, *The King* v. *The Inhabitants of Brampton, M.* 49 *G.* 3. 282

SETTLEMENT—*by Rating.*

Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own, but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish. *The King* v. *The Inhabitants of Killerby, M.* 49 *G.* 3. 292

SETTLEMENT—*by taking a Tenement of* 10*l. a year.*

1. A tenement found to be of the value of 4*s.* a-week, and to be demiseable at all times of the year, if let *by the week;* but not to be of the value of 10*l.* a-year, to be let *by the year;* cannot confer a settlement on the occupier

pier by residence thereon for 40 days. *The King* v. *The Inhabitants of Hellingly*, *T.* 48 *G.* 3. 41

2. Renting the hire or privilege of milking two cows belonging to another, at so much per week, per cow, for 40 weeks; which cows were to be *depastured* by the owner on his farm in common with his other cattle, and were to be milked by the pauper; will gain him a settlement, if the pasturage of the two cows be worth 10*l.* a-year. *The King* v. *The Inhabitants of Stoke-upon-Trent*, *H.* 49 *G.* 3. 496

SEXTON.

See MANOR, 1.

SHERIFF.

A sheriff justifying in trespass, under a writ of fieri facias, need not shew its return; the distinction being in this respect between a justification under mesne process, and under process in execution; at least where in the latter case no ulterior process is necessary to complete the justification. *Cheasley* v. *Barnes*, *T.* 48 *G.* 3. 73

SHIP.

1. The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be sea-worthy, or repairable so as to carry the cargo to its place of destination but at an expence exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to *sell* the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised bonâ fide in a case of necessity; still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the register acts; and the requisites of those acts not having been complied with, the sale in question was held to transfer no property to the vendee. *Reid* v. *Darby*, *T.* 48 *G.* 3. 143

2. A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage: and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Splidt* v. *Bowles*, *M.* 49 *G.* 3. 279

3. Where in a charter-party freight was to be paid at so much per ton, *on a right and true delivery of the homeward bound cargo*, from *Honduras Bay* to *London*; and the ship and cargo, after capture and recapture, having been wrecked at *St. Kitt's* into which they were carried by the recaptors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master acting bonâ fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners. Held that the freighter might recover such proceeds, in assumpsit for money had and received, without allowing freight pro ratâ itineris. For such form of action for the proceeds of an illegal sale of goods is only a waver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt, which admits of a set-off, &c.: but does not recognize the right of the vendor so to convert the goods. And here the act of conversion, (for such it must be taken to be) being made by the master, who is the general agent of the ship owners; and not, as in *Baillie* v. *Modigliani*, by the act of a Court of competent jurisdiction,) was unlawful, and discharged the claim of the ship owners for freight pro ratâ itineris. *Hunter* v. *Prinsep*, *M.* 49 *G.* 3. 378

4. But the plaintiff could not recover against the ship owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the

the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged with respect of the same subject matter by a contract not under seal and signed by their master only, and not by themselves. *Hunter* v. *Prinsep, M.* 49 *G.* 3. 378

SPECIAL JURY.

See PRACTICE, 1.

STAGE COACHES.

See TURNPIKE 1.

STAMPS.

A promissory note for 100*l.* payable to the plaintiff, or order, and originally, expressed to be *for value received*, generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words *for the good-will of the lease and trade of Mr. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill* v. *Williams, H.* 49 *G.* 3. 431

STATUTES.

The stat. 42 *G.* 3. *c.* 38. forbids corn making into malt to be wetted, while it is a-floor, before 12 days from the time when it is emptied out of the cistern. The stat. 46 *G.* 3. *c.* 139. *s.* 1. repeals that provision generally, and enacts (*s.* 3.) that the corn in that state shall not be wetted till 9 days, &c. after the 1st of *Aug.* 1806. Then *s.* 14. enacts that *this act* shall commence and take effect, as to all matters whereof no special commencement is thereby provided, from the 1st. of *Aug.* 1806, and shall continue in force till the 25th of *March* 1807. Held, that incorporating the 14th with the 1st section, this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of *March* 1807, and a subsequent act reviving and continuing the 46 *G.* 3. *The King* v. *Rogers, H.* 49 *G.* 3. 569

STATUTES.

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47. *st.* 2. *c.* 35. (Annual indemnity act) 211
48. *c.* 125. (Insolvent debtor) 408

SURETY.

1. The laches of obligees in a bond, (conditioned for the principal obligor to account for and pay over from time to

to time all such tolls as he should collect for the obligees) in not properly examining his accounts for 8 or 9 years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel *at law* in an action against the sureties. *The Trent Navigation Company* v. *Harley*. *T.* 48 *G.* 3. 34

2. The Prince of *Wales* having granted an annuity for his own life, payable by the treasurer of his privy purse; which annuity was assigned by the grantee to another, with the Prince's assent; and a surety having given bond to the assignee of the annuity, conditioned to pay it, if the Prince, or the treasurer of his privy purse, or any other person for the Prince, did not pay it at the respective quarter days: held that the surety was bound at all events at law by the terms of the obligation to pay it, if the Prince, &c. did not at the stipulated times of payment; whether or not the grantee or assignee of the annuity had the right or means of compelling payment against the principal or his funds, by reason of any default of such grantee or assignee in not presenting a particular of his demand to the Prince's treasurer, as required in all cases within the stat. 35 *G.* 3. *c.* 125. *s.* 7. on pain of being foreclosed of such demand; whatever equitable claim might be founded by the surety on such neglect. *O'Kelly* v. *Sparkes*, *M.* 49 *G.* 3. 369

SURPLUSAGE.

See PLEADING, 7.

TENDER.

See PLEADING, 12,

To make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. Therefore where the defendant, on departing from home, left 10*l.* with his clerk for the plaintiff; of which the clerk informed the plaintiff when he called, and demanded a larger sum; and the plaintiff said he would not receive the 10*l*, nor any thing less than his whole demand; but *the clerk did not offer* the 10*l.*; this was held to be no tender. *Thomas* v. *Evans*, *T.* 48 *G.* 3. 101

TIMBER.

See COPYHOLDER, 3.

Beech being admitted to be timber by the custom of the county of Bucks, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth; and therefore upon an issue, whether certain beech trees in that county, (which after being felled had been distrained for payment of a poor's rate, to which it was contended that they were liable,) were or were not *timber*, according to the custom of the county, the inquiry is confined to the nature of the wood, and the period of its growth, whether of twenty years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood. And the jury having found a general verdict for the plaintiff on that issue, affirming such trees of twenty years' growth and upwards, though not containing ten feet of solid wood, to be *timber* by the custom; and also upon another issue, negativing them to be *saleable underwood* within the stat. 43 *Eliz. c.* 2.; the Court refused to grant a new trial. *Aubrey* v. *Fisher*, *H.* 49 *G.* 3. 446

TITHE.

1. At common law grass is titheable in grass cocks, after having been tedded in the course of the process of making it into hay. *Newman* v. *Morgan*, *T.* 48 *G.* 3.
2. The tithe of turnips drawn to feed cattle held to be properly set out by being thrown aside, as drawn on a ridge opposite for the parson, without being set out in heaps for him: the farmer not putting the nine parts into heaps for himself. *Blaney* v. *Whitaker*, *M.* 23 *G.* 3. *B. R.* cited. *ib.* 12
3. Compositions for tithes cease on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due

due after the death of his predecessor, he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to, and not pro ratâ, according to the time which had run before his death from the last payment. *Williams* v. *Powell, Clerk, M.* 49 *G.* 3. 269

TOLL.

See MARKET-TOLL. TURNPIKE.

TRESPASS.

See COPYHOLD, 1. PLEADING, 1. 3. 5.

TURNPIKE.

1. A turnpike act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage or horse, exempts the traveller from paying a second time in the day for the passage of the *same carriage*, though drawn by *different horses*, being the same in number. And another clause providing that in all cases of *carriages travelling for hire*, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages repassing with a different traveller or passenger, does not extend to *stage coaches*, the *carriage itself* not being there *hired* by the respective passengers, but only a conveyance by it: and therefore such stage coaches are freed of toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number. *Williams* v. *Sangar*, *T.* 48 *G.* 3. 66
2. A collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the toils for which he had credited the defendant passing through the gate: no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that she should have *the remainder* next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls. *Peacock* v. *Harris, T.* 43 *G.* 3. 104

VENUE.

See PLEADING, 14.

The venue may be changed in an action for criminal conversation on the usual affidavit, that *the whole cause of action*, if any, arose in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife; and the venue can only be brought back by the plaintiff's undertaking to give material evidence in the original county. *Guard* v. *Hodge*, *T.* 43 *G.* 3. 32

VOTING.

See CORPORATION, 1, &c.

WAGER.

See ASSUMPSIT, 1.

WASTE.

See COPYHOLD, 3.

WITNESS.

1. Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own, but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish. *The King* v. *The Inhabitants of Kilerby, M.* 49 *G.* 3. 292
2. A rated inhabitant of a parish is to be considered as a party to an appeal

between his parish and another, touching the settlement of a pauper; although the nominal parties be the churchwardens and overseers of the poor of the respective parishes; and being as such party directly interested in the event of that proceeding, he cannot be compelled to give evidence by the adverse parish even since the stat. 46 *G.* 3. *c.* 37., not being within the words or meaning of that law. *The King* v. *The Inhabitants of Woburn, M.* 49 *G.* 3. 395

END OF THE TENTH VOLUME.

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